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809

No. 2251

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit.

MATSON NAVIGATION COMPANY

(a corporation),

*Appellant,*

vs.

UNITED ENGINEERING WORKS

(a corporation),

*Appellee.*

## BRIEF FOR APPELLEE.

NATHAN H. FRANK,

IRVING H. FRANK,

*Proctors for Appellee.*

*Filed this.....day of October, 1913.*

*FRANK D. MONCKTON, Clerk.*

*By.....Deputy Clerk.*





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Court of Appeals  
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In the discussion that follows, it shall be our endeavor to treat the subject calmly and to suppress the irritation that naturally arises from what we deem the unfair treatment of the facts of the case, coupled with insinuations, sneers and unfounded charges of misconduct, which seem to be the piece de resistance of respondent's defense.

Since there is no disputed question of law involved in the case, but our differences are entirely upon questions of fact, it follows that we cannot endorse appellant's statement of "Facts of the Case", which are rather a statement of some of its contentions, against which



there exists the presumption arising from the findings of the District Court.

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### **Facts of the Case.**

Since so much is said by appellant about the conduct of the parties and since its entire defense seems to rest upon a charge of overreaching, collusion and sharp practice, so distributed throughout a brief of over two hundred pages as to make it impossible, within reasonable limits, to follow him seriatim, we propose to give our version of the transactions connected with this controversy in as connected a form as possible. For convenience we will hereafter call the appellant the "Matson Co." and the appellee "the United".

To begin with, it will be borne in mind that the United is a large shipbuilding plant employing, in the shops and yards, between three hundred and four hundred men (pages 1496-7). It has work shops on both sides of the Bay of San Francisco, viz., at Alameda and San Francisco, with its principal plant at the former locality.

The controlling members of the company are Mr. Eva, who is what might be called the "business head" of the institution, Mr. Christy, who is general manager of the construction department, and Mr. Gray, who, among other duties, is head of the soliciting department. Mr. Curtis, as head clerk, had general supervision of the accounts.

The Matson Co. had, for about ten years preceding this trouble, been one of their customers with whom

they were on good terms and whom they desired to please. The record shows this without contradiction (V, pages 1687-8, VII, page 2396). This of itself creates a strong presumption against the charges of collusion and fraud, that are made in this case, by which it is hoped to convince the Court of a sudden change in the character of the men above mentioned. Neither, in what follows, do we desire to cast reflection upon Captain Matson, who was always known to be arbitrary and impetuous, but with whom nevertheless, the United was able amicably to do business for so long a period of time. We do not, however, hesitate to charge that, in this matter, he has been misguided and misled by a "new broom" that entered his household after this controversy arose and before it had crystallized.

At the time that the question of the repair of the "Hilonian" came up, the United had other contracts for work upon her.

With affairs in this situation, the Matson Co. asked for bids on certain specifications calling for large repair on the vessel. The United, among others, bid on those specifications. There is some controversy as to which of the exhibits in the record, purporting to be specifications, is the one upon which the United bid. This matter will be referred to later. The bid referred to is "respondent's exhibit Christy 'A' " (Record VII, page 2652) dated July 27th, 1909, for \$11,999, "*all to be in strict accordance with the specifications*".

All the bids were rejected, and new bids asked for.



On August 2nd, 1909, the United submitted a second bid, which was in all respects identical with the first, except that it was \$250 less in amount (respondent's exhibit Christy "B", Record VII, page 2653). The reason for this reduction is correctly stated in the lead pencil memorandum of Captain Saunders, attached to the exhibit.

These bids were again rejected by Captain Matson. Then followed a conference between Captain Matson and Mr. Gray, concerning the details of which there is some dispute, which we will hereafter consider. Suffice it to say that our version of this conference is, that Captain Matson maintained that the price was too high and concluded that the work should be done in accordance with the specifications but as a "time and material job", viz., day's labor, with the figure named in the bid as an "upset price", he to have the benefit of anything that it might cost less than that price. He, further then said that he would put a time keeper on the job, and himself proposed Mr. Putzar, to which Mr. Gray replied "He would be a first class man" (Matson, 1663-1664). Mr. Matson also made inquiry of Putzar's former employers concerning his ability and integrity and received from them satisfactory assurances.

The vessel was sent to the yard and the work begun. Mr. Klitgard as chief engineer, Mr. Saunders as superintendent and Mr. Putzar as timekeeper, represented the Matson Company at the yard. As the work progressed these three consulted and agreed for the Matson Company what should be done and what should not be

done. Captain Matson was East during most of the time that the work was in progress. Mr. Putzar was not only timekeeper, but had an understanding with Captain Matson that he was to be the engineer to take the ship out when her repairs were finished and was actually appointed by Captain Saunders to that office before Captain Matson returned (V, pages 1702-3). Captain Saunders also introduced Mr. Putzar to Mr. Christy, the manager at the yards for the United, as a man having authority to order work done and order changes (V, page 1228). During Klitgard's retention on board the vessel, the latter always consulted with Putzar, and changes ordered were agreed upon as hereinbefore suggested (III, pages 1103-6). The work had not progressed very far when it was ascertained that the specifications would not answer the purpose intended. Repeatedly, during the progress of the work along the line of a particular item of the specifications, after preparations had been made and the work had progressed along that line and parts of the vessel torn out, that line of work had to be abandoned and other and different work substituted (Siverson, III, pages 1090-3). This naturally resulted in loss of time and material and an expense not contemplated by the parties.

It is the contention of the Matson Company that these changes were agreed upon, as substitutes without further charge, between Klitgard for the Matson Company and, in some instances Wilhelmson and, in other instances, Gray for the United. The contention that the substituted work should be made as substitutes



without further compensation is denied by the United. It is also contended, by the Matson Company, that if it should be found unnecessary to move the crankshaft from the ship to the shop, a reduction should be made from the upset price corresponding to the alleged saving that might be made by the detention of the crankshaft on board the ship, and in other respects the upset price was to govern. This is also denied by the United.

In addition to the work hereinbefore considered, other new work continually cropped up and became necessary as the vessel was being dismantled (VII, page 2416). For some of this work, notably the renewal of the tank top, Captain Matson also asked for a bid. When the bid was given he treated it in the same manner that he had treated the original bid, namely, rejected it and asked that the work be done as a time and material job (VII, page 2353). The performance of this work, like with the engine work, exposed unexpected difficulties. After it had been finished and the tank top tested, a crack was found in the plates adjoining the work that had been asked for in the original bid. This necessitated not only the tearing out of the plates that were cracked, but also the destruction and the re-establishment of that portion of the work already finished where the new work had been connected with the cracked plates. So, too, with the tank bulkhead, which under the test disclosed unforeseen weaknesses, requiring further labor and material in its repair (VII, pages 2354, 2355, 2417). Again in the shaft alley the couplings were found so rusted and pitted as to require facing off, resulting in a

shortening of the shaft and this, in its turn, made it necessary to change the position of the bearings (III, page 1098). And so along the line. It is not our present purpose to enumerate the details in this respect, but only to give such a resumé as will indicate some of the reasons why Captain Matson, who was not present, and who only had in mind the original idea respecting the cost of the work called for in the original specifications, was surprised and disappointed when he ascertained the actual cost of the repairs on the ship. In his own words, "I was dumbfounded" (V, page 1686).

Mr. Gray, who, it will appear, was as solicitous for Captain Matson's interests as for his own, and knowing Captain Matson's disposition (which the parties admit is arbitrary and somewhat impetuous, as also appears from his manner of testifying) was very much worried about the increased expense (Klitgard, VII, page 2010) and desired to curtail it. When he found that the new work, cropping up in the progress of the repair and being ordered by the Matson Co.'s representatives, was mounting up so high, he told them about a week and a half or two weeks before the job was finished (the vessel was under repair, in all, about twenty-eight days) "That they were getting themselves into a hole, that they were not going to get out very easily. Matson was out of town at that time and *they had better stop finding any more work on the ship*" (VII, page 2381).

After the work was completed and while Matson was still in the East, the United presented its itemized bills



in the form shown in the exhibits to the libel. Schedule 1 bears date September 27th, 1909.

These bills seem to have been overlooked by the Matson Co.'s office. They were thrown into a drawer "into which the bills were thrown during the course of the month and then sorted over at the end of the month. That was the first time I had seen it or anybody else". Under the custom of that office "the bills were all gone over at the end of every month, they were taken out of that drawer" (Saunders, V, pages 1831-1832). The Matson Co. was usually allowed a credit of from thirty to sixty days (V, page 1750); and sometime in November, the United made application for money. As a result of telegrams between Captain Matson *in the East* and his bookkeeper in San Francisco, a check was tendered for \$15,500, as being payment in full, which the United refused to accept (V, pages 1750-1751; IV, pages 1459-1460). This was done under Captain Matson's orders though at the time he had not seen the bills nor did he know anything about the facts.

When he returned, he says, he called for Putzar's report on the time to check up the bills, and claims that it was reported to him by Captain Saunders that Putzar, who was then at sea as engineer of the "Hilonian", would render his report as soon as he could make it up (V, page 1711). There is evidently some misunderstanding about the nature of the report that Captain Matson was looking for. While it is now contended by the Matson Co. that it was the time sheets, known as Curtis Exhibit 4, nevertheless, when that book, coming

from his possession, lay before him at the hearing, the witness insisted that it was not the report that he was looking for, but that he was looking for a small pocket book. The materiality of this fact arises from the suggestion that Putzar delivered one copy of that exhibit to the United and was withholding the other copy for the purpose of editing it. It turns out, however, that there was another real "report" from Putzar which the witness says he glanced over and saw that it was not what he was looking for and paid no attention to (V, page 1727). He still insists, however, that he was looking for a time book. "Was looking for a time book that he would put the men down that were working in the morning and check them up at night, from day to day. I was not looking for a report that was made up, I wanted that time book which the man that keeps time generally carries with him, so that I could check up the time and see what had been done." To the suggestion that he did not think of looking to the time sheets that were handed in for that purpose, he simply replies "I wanted the time book" (V, pages 1726-1727). Since the pocket book was a mere memorandum and the exhibit referred to was the permanent form into which it was transferred (Curtis, IV, page 1430), the latter was the record which Captain Matson should have consulted, but which he persistently refused to look at. That it was not found in his office when he inquired for it is not at all inconsistent with the fact that it was there, as witness the inaccessibility of the bills which were thrown into a drawer and retained there for at least a month before they could

be found. Appellant does not tell us into which drawer this exhibit was thrown nor what search was made for it before it could be found.

But Captain Matson really did not want the time book and he had no idea of checking up the bill. He was angry about the matter and repudiated the bill simply because he considered it too big. As he says: "The contract was \$11,749 and look at the items of that", evidently forgetting that he had ordered other work which his pleading admits brought the amount up to at least \$22,922. When asked what he checked the bill up with, he says: "I refuse to answer a ridiculous question like that. I had a contract there, you know, that I went by. Anybody knows what I should check it up by."

Q. Is that what you checked up by, against the contract, is that all? A. Is not that enough. (V, pages 1723-1725.)

Klitgard, as engineer, had given him a report upon the work which he does not seem to know anything about. He never conferred with Klitgard about the bill (V, page 1715) though he insists that he was the man who had charge of the work.

When the trouble arose, the United *offered to check the bill up with the Matson Company*, but the offer was not accepted (V, page 1531), though this is the usual practice (IV, page 1486). When we started taking testimony in this case (the second day) we offered to go over the details and check up this entire work in its



detail with the respondent, which offer was ignored (I, pages 165, 166).

These matters are here referred to in order to place the Court in possession of the attitude assumed by the respondent toward this dispute.

Previous to taking the testimony, the same disposition was disclosed in the settlement of the pleadings. The exhibits to the libel set forth the claim of the libelant in the most minute detail, presenting, to the respondent, libelant's claim in an account for every piece of material and hour of work upon the job. This was in accordance with libelant's understanding that the work was to be done upon a time and material basis and that the upset price was abandoned by reason of the changes in the work specified. After having excepted to the libel and the exceptions being overruled, it files its answer, in which it sets up a contract for \$11,749, but admits "omissions, modifications and changes in the specifications under said contract, which were made and omitted *without an agreement between the parties as to the value of said omissions, changes and modifications*".

It further sets up that there was other and additional work and materials furnished outside of the contract, and that the reasonable value of the work and material omitted from the agreement is \$1398.25 and that of the additional work is \$8280.50. It also alleges the furnishing of certain supplies that "were of no greater value than \$937.07", and "expressly reserves the right of proving at the trial of this cause the value" of said materials and supplies, and then alleges that the total

amount due and owing to libelant under the first cause of action, viz. Schedules 1, 2 and 3 of the libel, aggregates not more than \$19,568.32. It then, as an additional defense, alleges a tender of \$22,922.56.

Particularly, however, the answer in Article II (Record, page 46) “denies that Schedules 1, 2 and 3 annexed to said libel *truly set forth the particulars or the value of said materials and labor*”. Exceptions were filed to this answer, upon the ground, among others, that the respondent denies that Schedules 1, 2 and 3 annexed to the libel *truly set forth the particulars or the value of said materials and labor*, without stating what particulars are not truly set forth in said schedules or wherein any of said particulars fail to truly set forth the value of said *materials and labor* (p. 58).

A motion to strike these exceptions from the files was denied. The exception just mentioned was allowed and respondent ordered to amend Article II, of its answer, namely, the denial of the particulars and value of the materials and labor contained in the Schedules 1, 2 and 3, so that it would state definitely which of the items of *material and labor* respondent admits the libelant furnished or performed for the steamer “Hilonian” and which of *said items* the respondent denies the libelant furnished or performed; reserving the right to the respondent where it had no knowledge of said particulars to so state. Respondent, however, was not required to make its answer any more definite so far as it concerns the value of any of said items.

In response to this order, the respondent amended its answer by admitting the *heading of the bill*, which is only a statement of the *results* of the labor performed and materials furnished. With regard, however, to the *itemization of the bill, showing the materials furnished and labor performed* together with the value thereof, which libelant had alleged the said schedules did not truly set forth, the respondent took shelter under an allegation of lack of “knowledge, information or belief sufficient to make answer thereto and on that ground calls for proof of the same” (page 62)—this, notwithstanding the other part of its answer alleging the reasonable value of *work and materials* omitted from the alleged agreement as \$1398.25 and of the additional *work and materials furnished* as aforesaid as the sum of \$8280.50, and of other *work and materials* of the value of \$937.07, all of which, together with the \$11,749, claimed to come under the alleged contract, constitutes the \$19,568.32, which the answer admits to be due for the *work and labor claimed by libelant under Schedules 1, 2 and 3*.

It seemed incredible that respondent should have information and belief upon a subject sufficient to give the values of the work and labor included in this allegation and yet be ignorant with respect to the items which composed those amounts. Exceptions were accordingly taken to the amendment upon the ground that it was not a compliance with the order of the Court. At the same time, interrogatories were pro-



pounded to the Matson Company (I, pages 74-79) drawn with a view of securing the itemization upon which the foregoing admitted values were based, to the end that we might be advised to what extent we were called upon to make proof of the items in said schedules. These interrogatories were excepted to as not being allowable under the 23rd Admiralty Rule. The exception to the amendment and the exception to the interrogatories were heard together. It will be noted that the order requiring the answer to be amended was made by Judge Donworth. When the second set of exceptions came on for hearing Judge Bean was on the bench and he overruled both exceptions, namely, our exception to the answer and respondent's exception to the interrogatories (page 84). The respondent then applied for a rehearing upon its exceptions to the interrogatories. The rehearing was granted and the exceptions to the interrogatories sustained, Judge DeHaven being upon the bench (pages 86-89). No appeal could be taken from this order because it was not a final judgment.

By this means the respondent escaped the necessity of making any admissions that would be of any value in determining our rights and thus we were put to a detailed proof of every item as it appeared in the schedules annexed to the libel. Thus was forced upon us the enormous labor of producing the time cards, and verifying them by the testimony of the workmen, and of proving each bolt, scrap of iron and hour of labor that went into the ship. It meant more than this, for the withdrawal of the workmen from their work and

bringing and retaining them on this side of the bay, to take their turn in testifying, meant the disarrangement and upsetting of all the work at the shops.

The object of the defense seems plain. They undoubtedly thought it was an impossible task for us to perform and hence their struggle to be relieved from rendering any aid by admissions in their pleadings and their refusal to sit down and check the matter up with us when suggested both before suit, and also on the second day of the hearing. When it became apparent that we were determined to perform the task at any cost, we were told by counsel that we were not trying our case properly, or as he would try it, and were constantly "badgered" at the hearing with this and the suggestion that our method of proof was unduly enlarging the record. When questions were referred to the Court for decision the same suggestion was repeated by respondent with instructions, volunteered to libelant, as to how he should prove his case. Of course, the Court could not be advised of what was taking place at the hearing before the Commissioner, and, not knowing the details of the controversy, seeming at one time to think that a simple matter was being made unduly complex, but evidently he appreciated the situation when the record came before him.

We were told that the proper way to make our proof was to have experts examine the work and give their opinion of its reasonable value. The value of such expert testimony will be appreciated by the Court when we come to consider the testimony of the experts of-

ferred by the respondent in this case. We may, however, be excused for our suspicion of the sincerity of that advice when we found that respondent was not only engaging experts to give their opinion of the value of this work, but had at the same time, *subsidized another*, from whom it could not get favorable testimony, *not to render any services to the libelant in case the libelant should apply to him* (Hough, Vol. IV, pages 1366-7, 1376-7-8-9-80, 1398-9).

Carrying the same spirit into this appeal, their defense rests upon an attempt to discredit our testimony, our bookkeeping and our methods of conducting our shops, by charges of fraud and collusion against everybody upon the side of the United connected with the work or with the preparation and trial of the case. It is hard to conceive of another place where, according to appellant's contention, could be found such a nest of collective immorality and general wrongdoing. Men, who have for a generation borne unsullied reputations for rectitude and fair dealing, have suddenly lost character because of an ordinary difference of opinion in a business transaction involving a difference of about \$12,000—that, too, where the difference arose between parties who, during a business connection of ten years, have had other differences, which have been amicably adjusted and who, in this case, are represented on the one side by a principal who is disappointed and angered because of the amount of a bill that he has not scrutinized and the details of which he refuses to consider, and on the other by one, who having those details, offers them for mutual consideration and adjustment.



The evidence offered of the details of the charges, as made from day to day, is the ordinary and usual method of the United for keeping track of its *general business*—not the business of the Matson Co. alone, but of all the business that comes into its shops, whether under contract, by day's labor or on its own account. A system intended to advise the United, when working under contract, what its profits on said contract are; when working upon pieces of its own manufacture for stock account, to advise it of the cost of such manufacture, and when working on time and material jobs to advise *both parties* of the cost of the job. That system of accounts is the foundation of the United's very existence and the workmen, who make the initial entries know no difference in the several classes of work, whether contract, time and material or stock account. On a single day a workman may be working on one or on all of said accounts. Each particular job, no matter on what account, is distinguished by an arbitrary number, and in case the workman works on more than one job during a single day, the number of each job with its appropriate time appears on the card. We shall refer to this detail again.

With this outline of the case, we proceed to a consideration of the questions presented by appellant, and shall take them up in their *natural* order, rather than follow appellant in reversing them.

The first question that naturally presents itself is, WHAT WAS THE CONTRACT BETWEEN THE PARTIES?

## I.

## CONTRACT OR QUANTUM MERUIT.

It will be borne in mind that the real controversy is as to the amount due under the first cause of action evidenced by Schedules 1, 2 and 3 of the libel. The amounts claimed under the second cause of action, and evidenced by Schedules 4, 5, 6, 7, 8, 9 and 10 annexed to said libel, are admitted as correct with some minor deductions, namely, \$171.88 from Schedule 4 and \$240 from Schedule 9 (Answer, last paragraph, pages 50 to 51). The District Court sustained the claim of the libelant to all of these minor items so in dispute, except the charge of \$180 in Schedule 9 (VII, page 2595), leaving a balance of but \$231.80 still contended for by appellant in that connection. Before the evidence was completed, Schedules 2 and 3 were also admitted as correct, leaving Schedule 1 as the storm center. Our argument will therefore be addressed for the present at least, to the first cause of action.

Appellant seems to think that, if it can prove that the bid of \$11,749 to do the work "in strict accordance to the specifications," *was accepted*, we are bound by that contract, and cannot recover on a *quantum meruit*. That being the foundation of his case, LET US ASSUME, FOR THE PRESENT, THAT THE BID WAS ACCEPTED.

The appellant's theory is that the work and labor items in Schedule 1 are, in part, covered by a contract to perform certain portions of the work for \$11,749, and that the said contract, so far as it can be traced

and distinguished, is the measure of damages. With this rule as a rule of law, we take no exception. It is so clear and well established that it does not require five pages of quotations for its verification. The trouble with some of the quotations, in appellant's brief (pages 192-197), is that the language quoted was used with reference to the particular facts of a particular case, and would not properly apply to the present case, unless the facts were the same. The rule, as a rule, is, we think, accurately stated in the quotation from I ADDISON ON CONTRACTS, pages 585-6, as follows:

“If work has been agreed to be done, and materials supplied under a building contract for a certain estimated price, and there has subsequently been a deviation from the original plan by consent of the parties, the contract and estimate are not on that account excluded, but are to be the rule of payment, so far as the contract can be traced to have been followed, and the excess only is to be paid for according to the usual rates of charging, but if the original plan has been so entirely abandoned that it is impossible to trace the contract and to say what part of it shall be applied, the workmen may charge for the whole work by measure and value, as if no contract at all had ever been made.”

Our criticism of appellant's position is pointed to the application he attempts to make of that rule to the facts of this case. His summation of the cases cited by him to this point, discloses the inaccuracy of his conception of the case.

Page 197, he says: “We submit that both in California and elsewhere the rule is clear that,



where contract work can be traced and distinguished from *extras*, the contract must prevail, though the *extras* should be figured on a *quantum meruit*."

This statement is misleading, as applied to the present facts, because it does not distinguish between the extras outside of the contract and the extras arising from omissions and changes in the contract itself.

We shall presently see that in the present case it is not a question of contract *and extras*, but an abandonment of the contract itself by the elimination of certain parts and the substitution therefor of a very different kind of work. In the words of respondent's own pleading (Answer, page 47):

"During the progress of said work it was mutually agreed that certain omissions, modifications and changes in said specifications and work to be performed under said contract should be made, and the same were made and omitted, *without an agreement between the parties as to the value of said omissions, changes and modifications.*"

1. We contend that these omissions, changes and modifications are so intimately connected and interwoven with the work called for by the original specifications, as to make it impossible to segregate them, or to segregate the alleged contract price, so as to apply its due and proper proportion to what remained.

That an attempt was made by libelant, to segregate the bill, is admitted by respondent (brief, page 156). That the attempt failed is also admitted, though respondent attributes the failure "to the method pur-

sued in the attempt''. The respondent also makes an attempt, which he offers as the basis of his calculations, but apologizes for it as "the best that could be offered *under the circumstances of the case*" (page 192). His was not, however, an attempt "to trace the contract" and to see what part of it shall be applied as the law requires, but it was an attempt to *re-establish* the contract by *substituting* the "omissions, modifications and changes in said specifications and the work to be performed under said contract" for the *original* specifications and the work to be performed under said contract. To the whole of this *changed contract* he then attempts to apply the *original contract price*. It was not an attempt to apply the contract price to *that portion of the specifications which were performed*, and an allowance for the changes as extras, but an attempt to *prove independent agreements between the parties for each of the omissions, modifications and changes in the specifications* and that *they should be substituted as compensation, the one for the other, without any change in the contract price*—and this too, in direct *contradiction of his answer* that the same were made "*without an agreement between the parties as to the value of said omissions, changes and modifications*" (page 47). His answer, as above quoted, *truly stated the facts with regard to those changes*, but when he came to his proofs, he found it impossible to conform to the rule established by the law and, in order to "force his balance", he advanced the contention of *substituted and compensating work*. This was directly contradicted by the libelant, in which re-

spect the libelant was fully supported by the admissions of the answer. Small wonder that the District Court found against his contention, and with that contention his entire theory of the application of the alleged contract fell. Nothing remaining, he resorts to a cry of fraud in the vain hope of tearing down the *quantum meruit* proof.

We shall refer to this admission of the answer in further detail when we come to consider the testimony upon the same subject.

2. **The Contract an Entirety.**—Further difficulty stared him in the face in the fact that his proposed contract provided that the sum of \$11,749 should be the price of the work, upon the condition that it was “*all to be in strict accordance with the specifications*”. The purpose of this provision is plain when we consult the specifications which contain fifteen items, most of which are interlocking work upon an engine. The contract was an entirety. \$11,749 was to be paid for the work set forth in the specifications as an entirety. It was a competitive bid upon the work as a whole. Changes in the specifications would destroy the entirety.

We reserve the consideration of the details of the work of respondent's alleged experts in their attempted segregation. We are now simply directing our attention to the fallacy of respondent's reasoning by which it attempts to suggest the application of an undisputed rule of law to the particular facts in this case. The experts made no allowance whatever for these changes



but, as already stated, treated them as if agreed upon by the parties as substitutions without further compensation.

As suggested, this contract was an entirety. That such a contract cannot be traced so as to show what part of it shall apply seems patent. Upon that fact depends the settled principal of law, that, when a contract is an entirety, the breach of one of its provisions voids the whole contract, and entitles the plaintiff to sue on a *quantum meruit*.

That such a contract could not be traced, where there are changes in the work specified, is also supported by authority, though it does not seem to require it.

In *LINCOLN v. SCHWARTZ*, 70 Ill. 137, there was an agreement to do mason work on a building for an aggregate sum of \$2880 and the work was interrupted by a fire. The trial Court instructed the jury that “the plaintiffs had a right to suspend work on the building, *and were entitled to recover the reasonable worth of the material furnished and labor done*. The exception taken to the instruction is, as respects the rule of recovery, that recovery could be had only for the value of the work done *according to the price, as regulated by the contract*”.

Thus was raised the very issue that we have here in this case. The appellate Court, however, said:

“It is not apparent how the prices of specific part of the work were regulated by the contract. The contract was, to do the whole work for a

specific sum of money, to be paid for in instalments, on the architect's certificates; and the contract furnished no rule to determine the value of any specific portion of the work. For anything disclosed in the evidence in the case, and as applied thereto, we fail to perceive wherein the instruction given can be held as in violation of the rule that the special contract affords the rule of damages, so far as it can be traced and followed."

In *RHODES v. CLUTE*, 53 Pac. 990, a contract was under consideration that provided for the building of a dwelling house at the agreed price of \$3800 according to the plans prepared by the owner. The contractor commenced operations, but before the foundation was finished, at the instance of the owner, the plans were changed in many particulars indicated in the opinion.

The Court held that this was

"an abandonment of the contract and the creation of a new one without an agreed price for the erection of the structure under the altered plans. Where the owner of premises and a builder enter into a contract for the erection of a building, at an agreed price therefor, and, after part performance by the builder, such material departures from the plans and specifications are made, at the instance of the owner, as will result in a new and different undertaking, without any agreement as to the price for such departures, the builder may recover for the reasonable value of the material and labor furnished in accordance with such new undertaking, and will not be limited to the price agreed upon in the original contract."

In *PITCAIRN v. PHILIP HISS Co.*, 113 Fed. 496, there was under consideration a contract for decorating, furnishing and refitting a dwelling house of the de-

fendant. The contract contained a provision for work to be done in the "daughter's room", specifying details, "cost to be \$5200". Upon this particular portion of the contract the work was defective and the lower Court charged the jury that the plaintiff's bill should not be disallowed on that ground, but that the defendant will be entitled to a deduction for the cost of repairing the defect and the plaintiff would be entitled to recover the *contract price less this deduction*.

The Circuit Court of Appeals held the instruction erroneous and said:

"The contract in question is an entire contract. \$5200 was the price to be paid for its performance. The contract itself did not attempt to apportion this sum among various items, and there was, therefore, no basis for such an appropriation, if otherwise it could have been appropriately made. The contract being entire, the price to be paid is single, and the consideration is solely for the performance of the whole work contracted to be performed."

In *ROUNDS v. AIKEN MFG. Co.*, 36 S. E. Rep. 722, there was an award by arbitrators under consideration. The subject of arbitration was a claim under a contract to do certain work for \$53,198 and in the performance of which contract, as it progressed, extra additions were agreed to be made to the mill and to the work all under the same contract and the builders went on to carry out the same (page 715). On the appeal, the question of the method of the arbitrators in arriving at the value



of the extra work thus done was under consideration, and the Court said (page 722):

“The very terms of the plans and specifications of the architects for the building of the Aiken Cotton Mill at Bath, S. C., required any changes in the plan of that building to be governed by the remuneration the builders, Rounds & Hagler, received for their work and material in building the original mill. In the contract of Rounds & Hagler the gross sum of \$53,198 is contracted for by them in payment for all their work and materials they should furnish in building the mill under their bid in writing. This being a sum in gross, how could anyone determine what any particular price [piece] of the work or material in said mill building would cost?”

Under these *admissions of the pleadings* and the above interpretation of the law applicable to such facts, it would appear that all the discussion, introduced into the record by the Matson Co., as to whether or no there was a “contract” or an acceptance of our bid, would be immaterial. Under the facts alleged in the answer, we might admit all that and still be entitled to recover on the *quantum meruit*.

**3. Value of modifications not agreed on.**—But, as already suggested, the respondent, at the hearing, developed a new theory, in direct contradiction of his pleading, viz.: that the “value of said omissions, changes and modifications” *was agreed upon* by the parties, and that such agreement was that they should be made without affecting the contract price.

We will, therefore, follow him into that subject matter.

The work was not done in accordance with the specifications. It was not done in strict accordance with the specifications nor even in substantial accordance with the specifications. Large and extensive changes were made, and the only contention that the respondent offers respecting these changes is that, when they were agreed upon, *it was also agreed* by the parties that they should be accepted *in lieu of the original* work called for and *at the original price*. In his brief, respondent calls these changes “*the substituted methods of performing certain items of the specification work and the compensation work for omitted specification work*”. The entire argument under this head is based upon the proposition that the parties agreed to the changes and also *agreed as to their value*, so that these omissions and changes should balance each other; or, to use the language of the respondent, the extra work done was *compensated for* by the items of the specifications under which the work was omitted.

The present contention of respondent is developed in the testimony of Mr. Klitgard (VI, pages 1928-30), where, in speaking of the second item of the specifications, which was omitted, he said “that he agreed with Mr. Williamson for a 12 inch balance piston on top of the low pressure valve” “that was to be a recompense for the second item”. When asked what he meant by recompense, he said: “The understanding was that the work was being done in recompense for *to keep the original specifications intact, so that there would be no*

*debts or credits*”. He says that this agreement was entered into between himself and Mr. Williamson. That, later, he told Mr. Gray about it, who said “that any alterations or things of that nature that in the future turn up, as long as Mr. Williamson was satisfied, he would be satisfied; that any agreement I came to with Mr. Williamson as far as recompensation matters were concerned, was all right”. He is then asked whether in his opinion “There is any material difference in the value of the work as called for under the second item of the specification and the compensation work which was done in place of that item”, and he says: “No, sir, there is no material difference. The matter was figured very closely at the time”.

Other changes were referred to where the witness testifies that an agreement was made as to the value, and respondent was *to pay* a difference in value, as, for instance with respect to item No. 4 of the specifications, he says (page 1931): “The agreement was between Mr. Williamson and myself that we would pay for the babbitting of the shoes; in other respects, the changes that had been made in this item were in recompense for what was not done under the item”. He explains the reason of the agreement to make this payment by saying, “Merely because if they had to cast new shoes instead of reconstructing the shoes, it would become a little more expensive” \* \* \* “By reason of the fact that patterns had to be made and new castings made, and a great deal more machining had to be done on them”. That to cover the extra expense respondent was to allow the United the price of the challenge metal “*in addition to the contract*”.



We do not now undertake to enumerate all the instances in which this occurred, but make the foregoing extract from the testimony merely for the purpose of illustrating the nature of the agreements which are now contended for by respondent. They are, in each case, in effect *an agreement* respecting “the value of said omissions, changes and modifications” and the manner of adjusting or paying therefor.

The contention rests solely upon the testimony of Mr. Klitgard with, in some instances, an attempted corroboration by Captain Saunders. It is directly and unqualifiedly denied by Williamson and Gray, and in this denial they are again supported by the respondent’s own admission made in its pleadings, for, as we have already noted, the answer distinctly and inqualifiedly alleges (page 47):

“That during the progress of said work, it was mutually agreed that certain omissions, modifications and changes in said specifications and the work to be performed under said contract should be made, and the same were made and omitted, *without an agreement between the parties as to the value of said omissions, changes and modifications.*” The answer further alleged: “That there was other work done not called for by the contract”, for which no price was agreed upon other than that the same should be compensated for at its just and reasonable value.”

These allegations are followed by an allegation:

“That the *just and reasonable value* of the work and materials omitted as aforesaid by agreement of the parties from the original contract as aforesaid is the sum of \$1398.25, and of the additional work

*and materials furnished as aforesaid the sum of of \$8280.50."*

It will thus be noted that the foregoing pleading not only directly alleges that the changes were made *without an agreement as to the value* thereof, but follows with an allegation of the *just and reasonable value of the extra work caused by those changes*. It is true that there is included, in that allegation of just and reasonable value, the value of "*other work* done not called for by the contract", but that both the "more expensive work", for which Mr. Klitgard says, the respondent was to pay "in addition to the contract", as well as the "other work not included in the contract", are covered by this allegation, is shown by the fact that nowhere else in the answer is that extra allowance provided for. The \$937.07, which is the subject of the next paragraph of the answer, *has no connection whatever with the foregoing*. The nature of the work of which it is composed is illustrated by Exhibit Heynemann No. 2, Vol. VII, page 2685. The items there referred to are those contained in Schedules 2 and 3 of the libel (pages 32-36) and are uncontested (Record, page 2020 and Brief, page 179). They are included in the "allowed bills as per schedules (bills 'B') \$3890" of the above Exhibit Heynemann No. 2 (page 2687) while the \$8280.50 is in said Exhibit itemized as "extra work contained in bill 'A' " with "overtime allowed on extra work".

That the allegation of \$8280.50, as the just and reasonable value, includes an allegation of the value of the changes, is further evidenced by the fact that the esti-

mates, under said Heynemann's Exhibit No. 2, are based upon the detail of Kinsman's Exhibit No. 2, which is an itemization of the bill head of Schedule No. 1 of the libel (pages 1583-1855), which schedule contained the specification work, as changed and modified, together with the extra work outside of the specifications. On their direct examination the experts followed these items of Kinsman's Exhibit No. 2 and pointed out the extras, item by item, including the allowance for changes and omissions in the original specifications with the allowance for extra work done independent of said changes in the specifications and sum up the aggregate of the two in the amount \$8,280.50 (see Heynemann's testimony, pages 2023 to 2050, inclusive).

The summing up is in the following language:

"Q. You made an estimate on the value of this work, did you?

A. Yes, sir.

Q. What was the value of the extra work that you have testified to?

A. \$6080.50 \* \* \*

Q. \$6080 for the extra work? A. Yes.

Q. Did you place that figure in writing?

A. Yes, sir, I did.

Q. And signed the writing? A. Yes, sir.

Q. I ask you if that is the writing? (handing)

A. Yes, sir, that is the writing. It is \$6280.50 instead of \$6080.50 and we further made an allowance of \$2000 on top of that for overtime for the extra work.

Q. What did you allow on the minor bills which are covered by *Schedules 2 to 10 of the libel*?

A. We allowed \$4827.07'' (pages 2050 to 2051).



We have been thus particular to show how the testimony corresponds with the allegation in order that the exact nature of the allegation as to the value of extra work shall not be misunderstood, because this allegation, as to the value of the extra work, in connection with the allegation that it was performed without an agreement between the parties as to the value of said omissions, changes and modifications, makes it absolutely certain that respondent, at the time its answer was drawn, was preferring no contention that the changes and modifications of the specifications were to compensate one for the other. Said admission of the pleading, as well as the evidence thus offered in support of it, proves conclusively that respondent knew that there was no agreement as to values, when those changes and modifications were made, nor was it understood, as Klitgard testifies, that there was an agreement to keep the original specifications intact so that there would be no debit or credit.

Under these circumstances what conclusion is to be arrived at with respect to the present contention that these values were agreed upon and were offset one by the other? And what are we to think of Mr. Klitgard's testimony "That there were to be no debits or credits", "that the figures that they [we] had given us [them] for these original specifications would remain intact", when, almost in the next breath, he admits that some of the changes were to be paid for "in addition to the contract" because of "more expensive work"?

The major portion of respondent's argument under this head is a collation of testimony to the effect that Wilhelmson and Gray *consented* to the changes. He might have saved himself this trouble, for there is no controversy upon that question. The changes were made by the consent of the parties, but there is not one word of evidence outside of the testimony of Mr. Klitgard, and in some instances of Captain Saunders, to the effect that we ever agreed as to the value of those changes or that those changes should not affect the contract price—that the additions and omissions should compensate each other.

The object of this collation of the testimony, is, however, disclosed by what we consider the unfair treatment given to it in the brief. Attempt is made to make the testimony wherein the witness admits he *consented to the changes* appear as though it were an admission that he consented to them *as a substitution without charge*.

After giving his own interpretation of the testimony of Mr. Gray (brief, page 167), which testimony, however, shows that Gray had refused to "swap" or substitute as compensation, the "balance cylinder" for work called for by the specifications, the respondent proceeds as follows:

"We then find this very interesting evidence:

'Q. Why did you decline to make a greater profit by a larger work if the whole job was a time and material job?

A. I did not refuse *to put in* the cylinder for him. He could have the cylinder or anything else he wanted on the ship. But he tried, his proposi-

tion was to take in place of the work on the valve as specified—he had a list of work for doing this other job, one offsetting the other.’

Here Mr. Gray was cornered and, we submit, he did not get out very gracefully. For him to say ‘I did not refuse’ was in direct contradiction of all his previous evidence as well as the evidence of Wilhelmson. To curtail the examination of the witness upon the subject of these changes and *relieve him from further embarrassment*, he was asked:

‘Q. And this testimony that you have given with reference to the balance cylinder would apply, would it not, Mr. Gray, to all of Klitgard’s requests for changing the work? A. Oh, yes, the same thing right straight through; yes.’ ”

How in the name of common sense can respondent expect one to accept his interpretation of this testimony? The entire evidence of libelant up to this point was directed to those changes in the work by the *consent* of the parties *without* agreement as to *values*, and the entire testimony of Mr. Gray is in conformity therewith. And how can respondent contend for a different interpretation in the words “I did not refuse” when they appear in direct connection with the further statement showing exactly what the witness meant when he said he did not refuse, namely, “I did not refuse to *put in the cylinder for him* \* \* \* but he tried, his proposition was to take in place of the work on the valve as specified \* \* \* he had a list of work for doing this very job, *one offsetting the other.*”

This is a sample of the unfair manner in which the respondent treats the evidence on many points throughout his brief, and which treatment of the evidence seems



to be his only foundation for his contention on this appeal.

Here let us supply the record of the proceedings connecting the above with the question and answer which respondent says was put to the witness to “*relieve him from further embarrassment*” (pages <sup>24 36 - 37</sup> ~~24, 37~~):

“Q. If it was a time and material job that would have been an advantageous proceeding for you, would it not?

A. Nothing wrong with it at all—

Q. But if it was a contract—

A. (Intg)—to have done one job and stopped the other.

Q. If it was a contract job it would not have been an advantageous proceeding for you?

Mr. FRANK. Now, just one moment. It is time for me to interfere in this matter, because you are wasting time. The witness has not testified that this job, according to the specifications, was not to be done for a given price. He said it was an outside price if it was done strictly according to the specifications. Now, you are using the word ‘contract’ which might have a double meaning, as though it meant a regularly executed written contract. He told you he rejected the bid, and that this was an outside price for doing it according to the specifications strictly, and if you changed the specifications he was not bound by that. What is the use of arguing as to the double meaning of the word ‘contract’ with the witness? You are trying to prove by this witness he had a contract because he refused to substitute one element of the specifications for another under the agreement which he has testified to. I do not care whether you call it a contract or what you call it, as long as you don’t use a double meaning.

Mr. McCLANAHAN. We will get back to the contract now. Read the question.

(Last question repeated by the reporter.)

A. If it was a contract, no, of course it would not be an advantageous proceeding under these conditions.

Q. All right. And this testimony that you have given with reference to the balance cylinder would apply, would it not Mr. Gray, to all of Mr. Klitgard's requests for exchanging the work?

A. Oh, yes, the same thing right straight through; yes."

Mr. Wilhelmson's testimony upon this subject is directly to the point, that he not only had no power to consent to changes in the specifications, independent of the question of values, but further that he *never did* agree to such changes, but referred them to Mr. Gray. He says:

"Well, I was entertained by the proposition of Mr. Klitgard, but I cannot have no voice, but I have no voice in that matter; this is the specification and it is up to the firm to change anything. *The mechanical end is what I was there for to attend to, and not any arguments why and wherefore.*

Q. Well, did you agree to it? A. No." (VII page 2502.)

The comment of the respondent upon the testimony of this witness is, that "we submit that it is weak" (page 164) and that the witness was still in the employ of libelant. Reference is made to his testimony in his earlier examination in the case, where he says, "To the best of my ability and memory there were changes, but it is utterly impossible for me to remember *all* the changes" and that two or three days before testifying again he had "talked with counsel,

Curtis and Gray," which later is thrown in to give the impression that he then received instructions respecting this matter notwithstanding it is undisputed "that his talk with counsel, Gray and Curtis did not have any reference to that subject," but that said testimony "was the result of a scratching up process."

In order to discredit the testimony of Wilhelmson concerning those "talks with counsel, Gray and Curtis," reference is made to the cross-examination of Mr. Gray with the following quotation therefrom:

"Q. Have you talked with him with reference to compensation, this 'swap' work? A. Yes.

Q. He is going to testify, is he, on that subject?

A. I do not know, you have got me. I am not running this case."

But why stop at that point in Mr. Gray's testimony when what follows shows conclusively that when Mr. Gray testified to his talk with Mr. Wilhelmson concerning the compensation or "swap" work, he referred to the time when the question *originally came up in the course of the work and not to any time since Mr. Wilhelmson's former testimony in the case.*

The following is the entire testimony of Mr. Gray upon the subject (page 2430):

"Q. Have you talked with Mr. Wilhelmson about this case?

A. I guess I have talked with everybody in San Francisco about this case.

Q. Have you talked with him with reference to *your testimony* in this case?

A. What part of the testimony.



Q. Any part. A. Oh, yes, I have spoken to him.

Q. Have you talked with him with reference to compensation, this swap work? A. Yes.

Q. He is going to testify, is he, on that subject?

A. I do not know. You have got me; I am not running the case.

Q. *What did you and he have to say about this compensation work so called?*

A. *Well, I had about the same to say to him that I had with Klitgard, whatever it was, that Klitgard was always trying to swap one thing for another. I don't know what he had in his mind.*

Q. Did he tell you——

A. (Contg) *Louis came to me with two or three propositions and I told him it was impossible, it could not be done.*

Q. Who is Louis? A. Louis Wilhelmson.

Q. What proposition did he come to you with?

A. He came to me particularly with that balance business.

Q. The balance cylinder? A. Yes.

Q. What did he say when he came to you with that?

A. Well, he said Klitgard had made a proposition.

Q. What was it?

A. To put on a balance cylinder instead of doing the work as specified on the low pressure seat in the valve.

Q. What else?

A. That covers it, with reference to that item.

Q. What did Williamson come to you for, to get your permission?

A. Well, he came to me with Klitgard's desire, with what Klitgard requested.

Q. Wanting your permission, did he?

A. Yes, wanted my permission.

Q. And what did you tell him? A. Told him No."

The examination of Mr. Williamson was directed to talk he might have had with anyone "*since your first testimony given on Sept. 11th, 1911*" (page 2516). And he said that "a couple of days ago I was to appear here and wait here to appear," which is the time that he talked to "counsel, Curtis and Gray." That he did not talk "particularly regarding this case" (page 2517).

It seems to us to be going pretty far afield to take those few lines out of Gray's testimony to establish a claim that he contradicts Mr. Williamson's testimony that the latter had not talked about the "swap" proposition *since September 11th, 1911*. Mr. Gray is asked *generally* if he had talked with Mr. Williamson about the case, without fixing any time, and he says, he has talked about it to everybody in San Francisco. He is then asked if he had talked with Williamson regarding "your" testimony in the case, without fixing any time, and he says "Yes, I have spoken to him." He is then asked if he talked with him with reference to the compensation, this "swap work"—again without fixing any time, and the witness answers "Yes." He is then asked "*What did you and he have to say about this compensation work so called?*" whereupon the witness relates what occurred between them in that connection *at the time the work was in progress*. Can anything be more clear, then, that the testimony of Mr. Gray respecting conversations with Mr. Williamson upon the question of "swap work" referring only to that time, and not to any conversations held subsequent to September 11th, 1911,—to conversations held at a date to which Mr. Wilhelmson himself has fully testified?

“The scratching up process” to which respondent refers is a very ordinary matter. The witness was being asked with respect to the changes being agreed to as to an offset which is followed by the question

“And you scratched your memory up on that subject without any assistance from anyone?”

A. Yes, sir. *I may think of a whole lot more details probably six months from now.*

Q. Then your memory gets better as time passes?

A. *Some times a thing may occur to a person's mind.*

Q. Nothing has occurred to your mind since your examination in September in reference to these compensation changes so called, has there?

A. No, sir, that was clear to my mind at all times.

Q. Then why did you not speak about the compensation changes in your first examination in September?

Mr. FRANK. I object to that because his examination in September had nothing to do with compensation changes. He was not asked about it, it was an entirely different subject at that time.

Mr. McCLANAHAN. Answer the Question.

A. I was asked on cards and such things as that.

Q. Don't you remember Mr. Williamson that you were asked about changes, *changes from the original specifications in this work*, you said “There had been changes, but you had no recollection of the cause or reason or nature of these changes?”

A. The details of them” (pages 2423, 2424).

The manner in which the subject was approached and the method in which it was attempted to confound the witness by calling his attention to testimony with respect to the changes, where no question of compensation was involved, and imputing to him a denial of



any knowledge or memory at that time concerning the *compensation element*, is illustrated by the testimony found in the record, Vol. VII, pages 2519 to 2524.

We cannot but note the effrontery of respondent, in its attempt to charge these two witnesses with false swearing upon this subject, when their testimony is in conformity with the allegations of respondents own answer.

Capt. Saunders is cited as supporting Klitgard in his testimony as to an agreement that these changes should be made without further compensation. The citations are to Vol. 5, pages 1781, 1782, 1811, and 1783; but that testimony discloses that the witness does not testify to any such agreement on the part of Mr. Wilhelmson. Speaking of the change in item No. 2 of the specifications, page 1781, the witness was asked whether he was present when that change was agreed upon and says:

“Not at first. I was present when it was finally agreed upon.”

“Q. Do you remember now the gist of the conversation?”

A. *Mr. Klitgard explained to me* that the work as called for in the specifications did not need to be done \* \* \* and that the United Engineering Works, through Mr. Williamson had agreed to put what he called the balance cylinder on as compensation for not performing this item 2 of the specifications.

Q. Was the question of debit or credit to either party mentioned?

A. There was to be no debit or credit; it was considered an equal exchange.

Q. Did Mr. Williamson make any statement at that time of approval or disapproval?

Q. He thought that that would be the proper thing to do with the cylinder.

Q. Was it agreed or not at that time to make the compensation?

\* \* \* \* \*

A. I reported that to Capt. Matson and he said that it would be alright if Mr. Klitgard approved. I so reported to Mr. Klitgard that he was to do as he considered best in that respect."

The refusal of the witness to directly testify to anything showing Mr. Williamson's *agreement to the compensation element* of that conversation is apparent. Saying that Mr. Williamson thought it a proper thing to do with the cylinder, applies to the agreement to *change the work* but not necessarily to the mode of *compensation*, and when the question is directly put to him in respect to the compensation he evades it by saying that he reported that to Captain Matson. He thus leaves this particular matter to be inferred from his statement of what Klitgard said to him in the presence of Williamson, but refuses directly to affirm that this particular part of the conversation was approved by Williamson. In the face of Mr. Williamson's denial of his approval of that particular part of the conversation this uncertain testimony is significant. It can hardly be accepted as controverting Williamson's statement.

On the next page, speaking of item No. 7, when both Gray and Williamson were present, he says that the "patch was finally agreed upon as being the best

thing.” He is asked “Do you know anything about any money compensation, a debit or a credit upon that proposition?” A. There was to be no compensation unless the weight of the patch exceeded a certain amount, about 900 pounds. Q. And in case that it did exceed the weight suggested, what was the understanding? A. The ship was to pay for the extra weight.

This is directly contradicted by both Mr. Gray and Williamson.

On the next page, 1784, he testifies to the change by the substitution of two stanchions on the forecastle-head in place of the work on the windlass, which he said “we decided to exchange for the two stanchions on the forecastle-head.”

With respect to the rollers for the chain-leads, he is asked:

“Captain, do you know about any credits that were allowed the Matson Navigation Company by the United Engineering Works arising out of this repair job? A. Yes.”

Apparently this question refers to the repair on the rollers or chain-leads, but what follows shows that that is not the case, for the credit memorandums allowed by the libelant for scrap brass for the old propeller and old tail-shaft as well as an old propeller and old tail-shaft on the steamer “Enterprise” are then introduced in evidence and it was to these that the question referred. But there is nothing to show that any one of these credits had anything to do with the work called



for by changes made in the specifications. The propeller wheel and tail-shaft on both the "Hilonian and Enterprise" are not specification items and there is nothing in any testimony showing that the scrap brass arose therefrom either.

To resume, therefore, we have on this question of agreement as to value of the changes in the specifications, on the one side, the positive testimony of Gray and Wilhelmson, supported by the respondent's answer, that there was no such agreement, with the positive testimony of Klitgard, in some instances supported by the inconclusive testimony of Saunders on the other, that there was. In addition we have the burden of proof on the respondent. Under such conditions it can scarcely be said that the finding of the lower court was erroneous.

Respondent further offers the fact that the changes in the specifications bore the same job number as the specifications originally bore, as evidence "That these changes were compensation work and intended to be carried on without affecting the contract" (brief, page 169). He does not, however, appear to enforce the suggestion by anything particular or germane, except to ask the question "Why if it was not compensation or substitute work, was it not given a separate number" (page 171).

That he had in view the answer to his own question is shown by his immediately taking up the testimony of Mr. Curtis to the effect that the changes referred to so complicated the work that it was no longer practical to

give them separate numbers and therefore he ordered the entire work to be done collectively. He refers to Vol. IV, page 1463 for this testimony. It is more clearly set forth in Vol V, page 1588, as follows:

“My reason for doing that was that there were so many changes and interchanges that conflicted one with the other, with pieces that were changed and rechanged, machined and remachined to suit different conditions that arose that it was impossible to segregate and keep a segregation in work under a number, for the reason there were so many changes occurring. It would take a great number of numbers to keep track of it”.

There is no contradiction of this state of facts and it explains the condition fully. Respondent's question is thus fully answered.

To say as respondent does that this was a deliberate mixing up of the work, does not affect the question we are now considering, namely, whether or no the uniform number can be accepted as evidence of a contract that the changes should be compensation or substituted work.

Attention will be given under its appropriate head to the balance of the argument under that heading, namely, that the work could have been kept separate.

That these changes in the specification (as well as the “*extras* and many of them, new work not contemplated or discovered except as the job progressed” admitted by respondents, brief, page 168), caused unnecessary loss of time, must be evident, notwithstanding respondent attempts to confine said loss of time to the latter,

extras, (page 168). They would cause loss of time for the very same reason that it is admitted these other extras caused loss of time, for those changes were also "new work not contemplated or discovered except as the job progressed" (brief, page 169). They were, therefore, subject to the same conditions which would cause unnecessary loss of time as the other extras were subject to. This is well illustrated in Siverson's testimony, Vol. III, pages 1089 to 1096, and Taylor's testimony Vol. III, page 1085.

In this connection, reference is made to one part of Siverson's testimony (brief, pages 168-169) in which Siverson referred to an instance as an illustration of how that loss of time would occur. Respondent does not attempt to gainsay the fact, but seizes upon it to suggest that the illustration is an unfortunate one because, as respondent contends, that particular loss of time was libelant's fault; that the work referred to in the illustration was the subject of a contract. Respondent must have been conscious of the fact that this did not aid his argument for he concludes, "but we are digressing somewhat." And that is the fact, for whether the illustration be of an instance under contract or one not under contract, it is a perfect illustration of how time is lost on such work, and, therefore, is as applicable to non-contract conditions, where specifications are being followed, as to contract conditions.



But the illustration offered by Mr. Siverson was not the subject of a contract.

The specifications provided (respondent's Exhibit "Christy C" page 2656): "Should spring bearings require remetaling, a separate price will be allowed for each." When it was determined to remetal them, only *two* were selected as requiring such work (page 1091), and, as Siverson says, "Those two were removed to the shop to be remetalled, the remaining three were cleaned up, scraped and scraped and dressed up in the usual manner with all grooves cut, *placed aside ready to be replaced* when the shaft and conditions required that it should be replaced." After this work had been done it was decided to *remetal these other three* and thus the above work on them was lost. The contract, therefore, under the specifications, as originally entered into, was to remetal *two* spring bearings, and it was afterwards changed by requiring remetalling of the other three that under the original agreement had been prepared for placement without remetalling. Was that our fault as stated by respondent? And were we not to be paid for the lost work which was rendered necessary by respondent's change of mind?

So we see that the witness was not "led by counsel to fall into error".

The foregoing would seem to establish clearly that whether there were or were not originally a contract for part of the work done under Schedule 1, the contract price could cut no figure in arriving at what is

due from the respondent to the libelant but that the libelant is entitled to recover as a *quantum meruit*.

**4. Bid was not accepted, but cost to be determined by time and material.**—This proposition is, however, further enforced by the nature of the agreement between the parties when the work was first entered upon, which as we contend was an agreement to do the work in strict accordance to the specifications *upon a time and material basis with \$11,749 as an upset price*.

In view of the foregoing discussion, we think we could very well afford to omit the consideration of this question and would do so were it not for respondent's attack upon us.

Our discussion under this head will also, in a large degree, tend to show how little dependence can be placed upon the testimony of respondent's alleged experts in making up respondent's estimate of the value of the work called for by Schedule 1 of the libel.

Our argument, thus far, proceeds upon the assumption that the bid was accepted, but we contend it was not accepted.

The difference, between the witnesses of the respondent and those of the libelant, to the making of the contract, is very narrow and, as we think, immaterial. Respondent raises his contention upon the statement of Captain Matson that he told Mr. Gray that he *would accept his bid*, but Captain Matson himself qualifies that acceptance. Construing his testimony in its most favorable light for respondent, it is that he told Gray

that while he considered the bid too high, he would accept the bid, but if the crankshaft did not have to come out, he would expect a reduction of a couple of thousand dollars, and that he would put on a timekeeper *for the purpose of securing that reduction*. He does not, however, confine himself to that purpose with respect to the timekeeper, but says, the timekeeper was put on to keep time *on the whole job*, unquestionably referring to the whole work of repairs then contemplated to that ship. Mr. Gray says, that Captain Matson said he considered the bid too high and that they would put a timekeeper on the job, and if it turned out that the expense of doing the work on a time and material basis was less than the bid, Matson was to have the benefit thereof. Under Matson's own statement therefore he did not accept the bid *as made*, but injected into it a new clause or condition not contained in the specifications or the bid. It is plain, therefore, that the contract is not evidenced by the specifications and the bid; that there was a qualification with respect thereto, and the nature of that qualification *depends upon the crankshaft controversy*. Matson admits that he objected to the bid as being too high and that the reduction which he expected was to be determined by the time and material element of the crankshaft specification, namely, No. 9. To begin with, an inspection of the specifications shows that that is the largest piece of work contained in the specifications.

It is true that Captain Matson is supported in his testimony by the testimony of Captain Saunders, his



employee, who claims to have been the only third party present, but questions of fact are not to be determined solely by the number of witnesses testifying on either side. There are other elements of evidence more convincing than the direct testimony of the parties interested or their employees. Let us therefore consider

THE CRANKSHAFT CONTROVERSY—To begin with, it is urged that there was a difference of opinion existing at the time the specifications were drawn up by Klitgard, Matson's engineer, as to whether or no that crankshaft should be taken out, and that Klitgard himself did not think it necessary. Under these circumstances, the question forces itself upon us, why did Klitgard draw up specifications requiring the crankshaft to be removed? Why did he not draw up specifications for the work which he deemed necessary to be done, leaving the removal of the crankshaft to be charged as an extra, in case it finally be determined that its removal was necessary, the same as was done with the large amount of other work that was subsequently found to be necessary and by agreement done upon a time and material basis? Or, if it be said that they desired as few extras as possible, why did he not draw the specifications in the alternative and take bids on both sets of specifications? Again, under respondent's contention, this question was not one that arose in an emergency, but it had been under consideration for months. The dispute, as they say, concerning the necessity of removing the crankshaft, had been under discussion for a long time. What, for instance, would have been their posi-

tion with the Union Iron Works or Risdon Iron Works, from both of whom they asked for bids on the specifications requiring the removal of the crankshaft? They had no dispute with them regarding the crankshaft; had not discussed it with them, and, if they had any doubt about the necessity of its removal, the question would have been entirely new to each of the other bidders. Did they expect them to accept a stipulated job for a fixed sum and, after the performance of the contract was entered upon,—the engine dismantled—raise with them the question as to whether or no the crankshaft should be removed and demand a reduction from the contract price? Such a procedure is highly improbable.

But the best evidence of what the agreement was came to the surface during the trial of the case. The Court will notice that during the early part of the testimony the respondent developed a theory that the crankshaft was not removed to the shop *because the United did not have a lathe in the shop of sufficient size to turn the shaft* (Vol. I, pages 249-256; Vol. III, pages 1093-94; Vol. IV, pages 1177-78), and they persisted in that contention until they discovered that they could not substantiate it (Christy, Vol. IV, page 1277; Gray, Vol. VII, page 2364; pages 2493-2499; Siverson, IV, page 1180). Nothing was said about it being unnecessary. The contention was that, while necessary, we were unable to perform the work for lack of facilities. For this reason they were contending for a reduction in the bill.

During the time of taking the testimony they made a complete change of front and, for the first time, advanced the contention that it was not *necessary* and *that it had been agreed* that, if it should transpire that it was not necessary, they should have an allowance of about \$2000. If there had been an agreement between the parties before the work was entered upon, which provided for the contingency of its being unnecessary to take it out, why prefer the contention that the *reason* it was not taken out was because of our lack of facilities to turn it *as called for by the contract?*

Then we have another and very interesting piece of evidence substantiating the above, and also disclosing the methods and the subserviency of respondent's alleged experts to the purpose of their master. When the experts were under cross-examination for the purpose of ascertaining the details, and thereby testing the accuracy of respondent's Exhibit Heyneman No. 4, the report of the experts contained in libelant's Exhibit Heyneman No. 2 (VII, page 2683) was shown to the witness by respondent's counsel to enable the witness to conform his testimony thereto as to amounts. The inspection of this document was requested by counsel for libelant (VI, page 2055). The document contains this statement (VII, pages 2684-2685):

“Bill ‘A’ consists of work done under contract and extra work. The contract price as per the offer of United Engineering Works under date of August 2nd, 1909, was \$11,749 and twenty-five calendar days item limit. *There was a benefit coming to the Matson Navigation Company if it*



*was decided not to take the crankshaft out of the ship''.*

In the same document (pages 2686-2687) is the following:

“With reference to the benefits coming to the steamship company for certain work not done and certain material not furnished *in the removal of the crankshaft*, we find a fair value of this amount to be \$1398.25”

That letter bears date San Francisco, *April 29th, 1910.*

The examination of the witnesses and the presentation of the document took place Saturday, *November 4th, 1911* (page 2012).

Then the following took place (VI, page 2056):

Mr. FRANK. Q. When was this letter written, Mr. Heynemann, or when was it signed—the one dated there April 29, 1910?

A. It was signed this morning.

Q. Freshly written? A. Yes.

Q. Why did you put that date on?

Mr. McCLANAHAN. What date?

Mr. FRANK. Q. April 29, 1910?

A. Because we wrote a letter on that date, and there was an error in it, and so we copied the letter, leaving out the error.

Q. Where is the letter that you copied?

A. I could not tell you.

Q. Why couldn't you tell me?

A. Because I don't know where it is.

Q. When did you copy it?

A. It was copied, as far as I know, this morning. I did not copy it at all.

Mr. FRANK. Have you got the other letter, Mr. McClanahan?

Mr. McCLANAHAN. I did not copy it, Mr. Frank.

Mr. FRANK. Q. Do you know who has got the copy of it—do you know who did copy it?

A. No, I don't.

Q. That is very strange.

Mr. McCLANAHAN. Is that a question? If it is addressed to me, I will say this, that I will make the strange thing appear perfectly plain if counsel wants it.

Mr. FRANK. Q. Did you read the original letter of April, 1910, and compare it with this before you signed this? A. No, I did not.

Q. You did not? A. No.

Q. Do you know whether Mr. Gardner has the original letter?

A. I think very likely he has, though I don't know.

Q. And Mr. Gardner brought this letter here to-day for your signature; is that right?

A. No. He did not bring it over here. I signed it in Mr. Gardner's office; he did not bring it here, I signed it in his office.

Q. And then you saw the original letter in Mr. Gardner's office at the time you signed it?

A. No, I did not see it.

Q. You did not see it?

A. But I knew the contents of the original letter.

Q. We will get the original letter and then we will be satisfied.

Mr. McCLANAHAN. Let it appear that the paper which counsel was handed at his request by me is a copy of a letter dated April 16, 1910, addressed to the Matson Navigation Company and unsigned, and attached to it is a letter also addressed to the Matson Navigation Company dated April 29, 1910, and signed by Fred A. Gardner and L. Heynemann."

At the closed of the session that day a demand was made for the production of the *original* letter from

which the above mentioned letter was copied, and on the following Monday it was produced, but before the witness was examined, counsel for respondent suggested a private conference and the following took place (page 2065):

“Mr. McCALAHAN. Mr. Frank, I think you are chasing rainbows in this matter of the investigation in the change in the letter, and I want to, if possible put you right on that *without encumbering the record*, For that <sup>PURPOSE</sup> ~~reason~~ I want to submit to you frankly, and in the right spirit, all the data on which you may determine whether you think it is right to put it into the record, *but if we once enter into it, it is going to extend the record to a great length. Do you understand me?*

Mr. FRANK. I understand you. (After a colloquy between counsel and an examination of papers) I think I will have to pursue the examination.”

We note at this time that, after the foregoing *warning* as to what would happen if we persisted in putting the second letter into the record, the attempted explanation or justification of the remarkable condition the letter disclosed, which was “going to extend the record to a great length,” is contained in just fifteen lines of the printed record, and will presently be discussed.

The original letter is found in volume VII, pages 2678, 2681, and is marked libelant’s exhibit Heyneman No. 1.

In that letter the parts above quoted from libelant’s exhibit Heyneman No. 2 originally read as follows:

“Bill ‘A’ consists of work done under contract and extra work. The contract price as per the offer of the United Engineering Works under date



August 2, 1909, was \$11,749. and twenty-five days *with the proviso that this was to be an upset price and if the work could be done for less than the above amount, figuring the best obtainable rates, both for material and labor, then the steamship company should receive the benefit of same.* This difference between the contract price and the amount for which the work could be done we have designated under the caption 'Benefits'. Besides the above benefits, we have also figured in certain allowances for scrap material as will appear later on."

Again (page 2681):

"With reference to the benefits coming to the steamship company for certain work not done and certain material not furnished *as per original contract*, we find a fair value for this amount to be \$1039.25."

This is precisely the agreement to which Mr. Gray has testified as the one entered into between him and Captain Matson and this proves conclusively that at least up to the time when they discovered, in the course of the testimony, that their contention that we had no facilities to take the crankshaft out had failed, that their understanding of the agreement was precisely the same. The experts named were doing their work under the instructions and directions of the respondents and this indicates precisely what the detail of their instructions was with respect to this contract.

Now for the explanation that was "going to extend the record to a great length". At the close of Mr. Heyneman's testimony, Mr. McClanahan takes the

stand and begins with an explanation of why he did not call Mr. Putzar. This will be referred to again. At the end of that explanation, we have the following (VI, page 2199):

“In regard to the redrafting of the letter of April 29th, 1910, I would say that that was redrafted solely at my suggestion and for the reason that I did not understand the proviso contained on the first page, nor could I learn from either Messrs. Gardner or Heyneman, where they had secured that information. *I did, however, when the matter was under discussion refer them to a report made to me by Mr. Diericx at the time of my employment, in which that proviso was contained*—(The witness is here interrupted by an objection.)—together with the further statement showing clearly that the proviso referred to the possible nonremoval of the crankshaft. I asked Mr. Gardner if he had that report in his possession, or a copy of it, and he said he thought he did have it.”

Now, what does this explanation show? It shows that Mr. McClanahan received a report from Mr. *Diericx*, the assistant manager of the company, in which the contract was stated in the terms contained in the proviso, but which report the witness said also contained other statements showing that the proviso referred to the possible nonremoval of the crankshaft, and that report the witness traces into the hands of Mr. Gardner. It was given to Mr. McClanahan at the time of his employment, which certainly was before the filing of the libel, namely, *March 7th, 1910*. On *November 4th, 1911*, Mr. McClanahan suggested the redrafting of that letter in the form above indicated, by which

the portion of the proviso which states the contract in the terms we contend for, *is eliminated*, notwithstanding that portion of the proviso *was in the report*. He not only eliminates it, but he *substitutes* the crankshaft contention on his *bare recollection* of the contents of the report delivered to him more than a year and one-half before. Furthermore, while he says he asked Mr. Gardner if he had that report in his possession, or a copy of it, and Gardner said *he thought he did have it*, yet Mr. Gardner, who that same afternoon is placed on the stand, *is not asked to produce it or to account for it*.

Under these circumstances may it not, in all fairness, be presumed that Mr. McClanahan's recollection that the report contained "a further statement showing clearly that the proviso referred to the possible nonremoval of the crankshaft" is at fault? Particularly, when we find the experts not only make no mention of such "further proviso", but also change their letter by also striking out (page 2681) the words "as per original contract" and inserting in place thereof the words "in the removal of the crankshaft", when giving their estimate of the "fair value" of the "benefits coming to the steamship company", and, at the same time, *change the amount of the estimate from \$1039.25 to \$1398.25*.

So, also, if there were such a further statement why eliminate the very suggestive proviso? Why not let that remain and *add* the qualifying statements? Again, *why change the report at all?* It was a report to the *Matson Co.*, who, if the statement were not correct



would not be misled thereby. Must we not infer that it was anticipated that the report would be called for in the examination of the experts and that the change was made for the eye of the libelant rather than for the eye of the respondent?

But this explanation makes plain another thing. Mr. Diericx made a report to Mr. McClanahan at the time of the latter's employment, in which that proviso was contained. Of course, Mr. Diericx could only have received the information contained in that proviso from Captain Matson or Captain Saunders or both. *So we find in it, a memorandum of their recollection of the agreement made when it was yet clear in their minds, and before the new contention was born.*

The new contention found expression in the testimony of Captain Matson and Captain Saunders on *October 30th, 1911*. The change indicated was made in the above letter for the purpose of Mr. Heyneman's testimony, on *November 4th, 1911*.

Can anything be more convincing than this circumstance as to what the true nature of the agreement was between the parties? Nor do we wonder at the solicitude expressed, at the time of its production, that it should not go into the record.

With this before us, let us turn for a moment to respondent's argument upon this subject (brief, pages 133-158).

He begins with the proposition that if he can prove *the acceptance* of the bid, he has taken the "first step in the complete destruction of libelant's

*quantum meruit case*”. To this end he gives excerpts from the testimony of Captain Matson and Captain Saunders, whom he says, with the exception of Mr. Gray were the only parties present. He then attempts to fortify it by testimony of Mr. Klitgard, who was not present but met Gray coming out, to whom the latter said “He had got the work”. “I think his words were ‘we have got the job’,” which is followed up with the following interrogatories.

“Q. Do you know what he referred to?

A. Surely.

Q. What was it?

A. There was only one job in question, the specifications.

Q. What was the job? A. *A contract job.*

Q. A contract on the Hilonian?

A. Yes, sir” (VI, 1920-1922).

No comment is necessary upon this forced interpretation by a witness, who was not present *at the conference*, of the language of Mr. Gray when he said “We have got the job”, into an admission that Gray had entered into a contract to do the work for a fixed price, subject to a reduction if the crankshaft did not come out.

Comment is made upon the fact that on direct examination we did not ask Mr. Gray “a single question that would call for a direct contradiction of Matson and Saunders’ testimony on this point of the *acceptance* of the bid of August 2nd, 1909”. But what need of asking the witness for a legal conclusion. We asked him *for the conversations* that passed between them and directed his attention to the only

material fact in dispute, namely, conversations with respect to a reduction in the bid if the crankshaft did not come out of the vessel.

Again, we take it, that the fact that the testimony in question was brought out from the witness *on cross-examination*, rather than on the direct examination, is not only under the rules of evidence, but of common sense, an added badge of its verity. The characterization by respondent of that testimony as the "confused and contradictory position taken by this witness on this point when it is left to the cross-examiner to bring it out" (brief, page 140) does not in anywise impair its strength.

Much space is devoted to a consideration of what the contract was, and criticism is offered of the attitude of the witnesses, and incidentally of counsel for libelant, when, in the course of the examination, the witness is asked whether or no there was a "contract" for this work. Now, whether or no there be a contract is a question of law, to be determined by the Court from what was said and done by the parties at the time the same was entered into. More important still is the question as to what the nature of the contract was. Colloquially speaking, a contract is an agreement to do a specified piece of work for a fixed sum, but legally speaking any agreement is a contract, whether it be an agreement for a fixed sum or to do the work on a *quantum meruit*, and the question, in this case, was which of those two agreements was the one entered into by the parties. Between them, none but lawyers distinguished. It was, therefore, unfair to attempt to force a lay-



man, by asking him, "do you consider there was a contract in this case", to determine that question of law, for which he was unqualified, and afterwards to apply his general answer "There was or there was not" to either of the two conditions above referred to which might best suit the purpose of counsel's argument.

We therefore attempted to confine respondent to the <sup>Conversation</sup> ~~evidence~~ of the contracting parties, and to what was said and what passed between them, so that the Court might determine for itself the nature of the contract.

Respondent's examination, on the contrary, was an attempt to make the witnesses say there was a "contract" rather than to ascertain from them what the conversations were upon which the conclusion is based that there was a contract. Neither do we think that, with all the art and skill of counsel directed to that end, the witness's testimony is at all confused or contradictory upon this subject. He has plainly and persistently denied that the bid was accepted and has plainly given the details of the conversations which proves the agreement to have been for work on a time and material basis, conforming in every respect to the proviso stricken from the report above referred to by the experts.

In further detail we call attention to the testimony quoted in appellant's brief from the bottom of page 142 to the middle of page 144, which could not be plainer and which fully states the situation as we understand it.

To the quotations on pages 146 and 147 of appellant's brief, we desire to add the part of the proceedings which the brief omits and which illustrates what we have said concerning the nature of that examination. The record is as follows:

"Q. Now, Mr. Gray, we are not to take you as occupying the attitude that has heretofore been occupied in this case by your associates, that there was no contract in this matter. You made a contract, did you not?

Mr. FRANK. One moment. I object to that. I object to that and I instruct the witness he need not answer a question of that sort. It is a conclusion of law, whether he made the contract or not. He has already told you that the proposition was submitted and the whole details of it, and that Captain Matson refused to accept it, and told him he would put a timekeeper on it, and he told you all the details about it. Now, whether that was a contract or not a contract, is what the Court will determine. This man is not a lawyer, nor is any witness called upon to——

Mr. McCLANAHAN. (Intg.) It is going to give somebody trouble.

Mr. FRANK. (continuing) To answer any legal questions.

Mr. McCLANAHAN. Please answer the question, Mr. Gray.

A. What is it?

Mr. FRANK. Read the question and my instruction to him.

(The last question and instruction of Mr. Frank repeated by the reporter.)

Mr. McCLANAHAN. Answer the question, Mr. Gray.

A. Well, I have answered that two or three times. It seems to me that I proposed to do a certain amount of work for a given sum, and Matson would not accept it, and he said he would

put a timekeeper on and see if he could not save himself some money; it seems to me that answers it. What more of an answer can you have.

Q. Then, Mr. Gray, you do maintain that you made no contract with Captain Matson?

A. That is not for me to judge. I cannot see where I come in on judging whether it was a contract or not.

Q. Aren't you the man that goes around and gets work under contract? A. Certainly.

Q. Can't you tell whether you made a contract with Matson or not? A. He turned it down.

Q. Then you take the position that you made no contract? A. He turned the contract down.

Q. You take the position, then, that there was no contract with Captain Matson?

Mr. FRANK. What difference is it what position he takes in this case? He has told you the whole story and the Court will determine whether he made a contract or not, if it is material. He has told you he put a timekeeper on——

Mr. McCLANAHAN. Do not encumber the record any more than you have to, Mr. Frank.

Mr. FRANK. You should not encumber the record by doing something that you know is not proper under the circumstances. You have got everything you can legally call for.

Mr. McCLANAHAN. Q. Answer the question, Mr. Gray.

Mr. FRANK. You do not have to answer the question; you have already answered it.

Mr. McCLANAHAN. Q. Answer the question, Mr. Gray.

Mr. FRANK. Take your instructions on that subject from me, not from Mr. McClanahan.

A. Then I refuse to answer it.

Mr. McCLANAHAN. I shall ask for judgment in this case unless that question is answered, and move that all the evidence of this witness be stricken out.



Mr. FRANK. On what ground?

Mr. McCLANAHAN. Upon the ground that he is a party to this action, and he is a man that submitted this bid, and he ought to know whether that bid was accepted or not.

Mr. FRANK. He has already told you that it was not accepted. He has answered your question. You are now asking him to characterize it as a contract or otherwise, and you can make any motion you desire, on those grounds.

Mr. McCLANAHAN. I have stated what I intend to do.

Mr. FRANK. Very well."

We add nothing to what appears in the record on this subject.

The rest of the brief relating to this subject (pages 149 to 158) is taken up with comments upon the testimony of Mr. Christy, who had nothing to do with the making of the contract; Mr. Klitgard who also had nothing to do with it; Mr. Siverson, a workman, who also had nothing to do with it and Mr. Curtis, who also had nothing to do with it.

It will be borne in mind that the contract for which respondent is contending consisted of two papers, namely, a specification and a bid. The attempt of the respondent in the examination of his witnesses was to fix upon them the recognition of the *specifications*, dissociated from the bid, as *the contract*, and to show that, because they were working on the specifications, therefore they recognized the job as a "contract job." The futility of this is apparent, for no one denies that the understanding of the parties was that the work was

to be done "in strict accordance with the specifications." The only controversy is whether or no the price for the work to be so done was fixed by the bid and its acceptance, or to be ascertained by reference to the cost of time and material, and throughout the examination of these witnesses an attempt is made, as it was with Mr. Gray above, to get them to use the expression "it was a contract," to which Mr. Klitgard, their own witness, very readily lends himself.

We need not, at this time, follow respondent in his comments upon the testimony of Mr. Christy, or any of the other witnesses. Not being parties to the transaction they would have no knowledge of what passed between the parties at the time of making the contract and the mere fact that they were working under a set of specifications does not in anywise refute Mr. Gray's testimony upon the subject.

**Discrepancy in the several specification exhibits.—**At this point, however, we desire to call attention to a very important discrepancy in the specifications, now presented as the specifications upon which the bid was made, from the specifications upon which the bid actually was made, because all of the testimony of the experts is founded upon the former specifications and not upon the latter.

The only specifications that the executive officers of the United had was respondent's Exhibit Christy "C" (Record, page 2654), which had the file number of their office in blue marked upon the top. We note that

this blue mark does not appear in the printed record and suggest an inspection of the original.

This specification and exhibit is identical with the specifications contained in the *answer* as Exhibit 1 (page 52). This fact is conclusive regarding the nature of the specifications *upon which the bid was made and under which the work was undertaken*. The specifications, however, *which are presented to the experts* and under which their work, is done, is respondent's Exhibit Saunder No. 1 (page 2639), which has an important addition in the last paragraph and an unimportant omission of the words "no less" at the end of the seventh paragraph. Neither are the copies of the specifications, which were furnished to the workmen for their guidance in the work (by some of them called a list of work) the same as that found in the record as Saunder's Exhibit 1. Liverson's Exhibit "A" (which should be "Siverson's") page 2658, is identical in its provisions with respondent's Exhibit "Christy 'C'", except that it has appended to it the direction to bidders.

The material change in Saunder's Exhibit 1, is the provision "all bulk-heads, gratings, bracings and pipes, etc., removed during period of overhauling to facilitate work must be properly replaced and secured and all machinery satisfactory reassembled before work will be considered completed".

It will be seen at a glance that this general provision includes a very considerable amount of work and labor and hence expense.



The work thus performed we contend is an extra outside of the specifications. The respondent contends it was included in the specifications. When the attention of Mr. Gardner, one of the experts, was called thereto, he filled in the gap by stating that that would be implied under Exhibit Christy "C". Aside, however, from the objection that the experts are not the proper parties to construe our contract, we have not only a provision which, if we treat the case as one of an accepted bid, was to be "in strict accordance with the specifications," but we have also this significant interpretation placed upon the specifications by the respondent himself, namely, his insertion of the provision *ex industria* in the set of specifications now contended for, showing that they did not consider it implied.

We say therefore, as additional answer to the contention of a contract for a specified sum as against a *quantum meruit*, that if the latter specifications are what was intended by the respondent, then the minds of the parties never met and the negotiations referred to did not constitute a contract.

We also at this time call attention to this discrepancy in its relation to the estimates of the alleged experts offered as the foundation of respondent's case so that we may not have to discuss it at length when we come to consider the value of their testimony.

In the foregoing we think we have satisfactorily established the fact that the agreement of the parties that the work mentioned in the specifications was to be done

in accordance with the specifications upon a time and material basis with \$11,749 as an upset price, and that the upset price was set aside by the changes and modifications in the specification work as it progressed.

We think, upon the whole, we have satisfactorily established that the contract thus entered into was set aside by the "omissions, modifications and changes in the specifications without an agreement as to their value", and that, hence, we are entitled to recover on a *quantum meruit*.

The only question that remains, is,

## II.

### WAS THE QUANTUM MERUIT SATISFACTORILY PROVEN?

This is based upon a record for time and material under the card system upon which the United depended for its entire accounting system, and the system seems to have met with the approval of the Circuit Court of Appeals of the 7th Circuit, as we shall presently see. No manufacturing establishment can be carried on without an accurate knowledge of its cost of production. As already suggested, this card system was not employed solely for the purpose of *making charges against customers* who dealt upon a time and material basis, but it was the basis upon which the United ascertained the cost of production, whether they were building upon *their own account*, or on contract or on *quantum meruit*. Every kind of work that went through the shop was recorded in this same manner (IV, pages 1425-1431). It is un-

fair, therefor, for the respondent to contend, as he does, that this "detail was one affecting the pocketbook of the customer and not the libelant" and that "it mattered not, in the selection of his workmen, whether they were competent or incompetent, careful or reckless, fast or slow, old or young, deaf, dumb or blind." The inherent exaggeration of this statement condemns the entire contention. The suggestion that the slow and incompetent man is more profitable because he consumes a greater number of hours, is of a piece of this exaggeration and only one of the innumerable unfair statements contained in that argument. The record in this case shows conclusively that this particular job was being hastened with all the vigor that the United possessed; that it was limited as to time, and was a "rush job"; that there was other work in progress, during that time, which had to be abandoned and the men transferred to the Hilonian job (1288). What incentive could there be to increase the expense of this particular work when we had more work in the yards than we could perform? With all the men employed to their capacity, why would the United reduce their capacity?

So, too, with the statement that the libelant was unwilling to accept the unverified statement of employees of its own selection as to the aggregate number of hours each day, but insisted that the *respondent* accept such unverified statement: "that libelant takes due precaution against possible errors of omission or commission on the part of its workmen as they affect *it*, but when



it comes to the protection of the *customer* against the same vice that *is another matter*'' (page 16).

No reference is made to anything in the record justifying this remark. The only authority for it is the respondent's spleen and determination to build up a case upon misrepresentations. The record is clear that there was but one method of ascertaining the cost at the works, which was applied indiscriminately to all kinds of work, and was carefully and diligently checked and rechecked to insure its correctness within the limits of human error.

Respondent's answer to this fact is again characteristic. He says: "Our answer is that, if it be to the advantage of the libelant, from a financial standpoint, to be indifferent as to one class of work and vigilant as to the other, then assuredly *it would not be an unwise guess to predict the course that would probably be followed*. It may be the rule of the shop to refrain from informing the workmen that a certain job number represented contract work, but *it would be stretching one's credulity* to say that such information was not imparted to the foreman on the work. We have in mind that assistant foreman Adamson in some cases, had that 'detail'."

What kind of a man is it, whose "incredulity" is of that nature!

Indeed, it is astonishing that the respondent, after ten years of business relations with these men, working amicably and satisfactorily upon the same lines, suddenly finds that the entire works, including the

owner, foreman and workmen is one nest of *conspirators against its customers*.

It is needless to follow respondent through this line of argument. He gives no credit to anyone for common honesty. He indulges in nothing but unfavorable inferences and is thoroughly malignant throughout. No one, approaching the subject calmly, can do otherwise than feel that the defense set up against the methods of the United, in the manner of keeping these records, is the product of an intemperate mind.

The fairness and earnest desire of the United to meet its adversary upon a fair business basis is rendered certain by the record. Having a customer with whom it had done business amicably for years it naturally desires to retain that business. As already indicated, when the dispute first arose, it offered to check the matter up with the respondent and again when entering upon its proof it repeated the offer, which in both cases was declined. Before the pleadings were settled it endeavored to secure, from respondent, a statement of the things admitted, so that the controversy might be narrowed down to the things it disputed, but respondent resorted to technicalities to avoid fairly meeting the issue. It proceeds in the same line respecting its claims of alleged error in the time cards. After all of the United's detail, as shown by its cards, had passed into the possession of respondent, we find on the last day, the respondent making covert suggestions as to errors and omissions claimed by it to be disclosed by that record, without furnishing the United with any of

the details. When the United requested the respondent to point out the detail, wherein it claimed there was error, so that, if open to explanation, it might be explained, the respondent flatly and absolutely refuses, saying, that they decline to give us the benefit of their work upon the record. Counsel, at that time, made the impudent suggestion "that before he did such a thing he had better send in a bill to the United for a retainer"; and *until the brief was filed on this appeal* that detail was absolutely withheld.

Let us for a moment consult the record upon this matter.

At the bottom of page 1616, Vol. V, on the cross examination of Mr. Curtis, the last witness, a question is asked:

"Q. I understand Mr. Curtis that none of the work performed under special contracts appears in Schedule 1?

A. No, we checked it each day to the best of our ability and on both sides we kept a perfect check on it and there was every effort to keep it straight.

Q. So that if there is such work, there is an inadvertence?

A. Well, I don't know how that could be because checking it over when the work is fresh in the men's mind and anything that would come up that there was any doubt about would certainly be eliminated at the time.

Q. The men did not have anything to do with preparing Schedule 1, Mr. Curtis?

A. You are getting back to what I mean in preparing Schedule 1—you mean preparing Schedule 1?

Q. I mean this, that if there is any work appearing in Schedule 1 and should belong to and



does pertain to special contracts it appears there through an inadvertence and a mistake?

A. Well, now, I will tell you. You come back to the way the Schedule 1 is made up from reports and the different foremen, from the checking from the stock order cards and the checking of the time cards of the men that did the work every day, and I do not see, with a matter fresh in the minds of the men, where there could be anything belonging to special contracts charged in Schedule 1.

Q. I will reform my question. If there is any work set forth in the enumeration of work found in the first, second and third pages of Schedule 1, that is work belonging to special contracts, it is there through inadvertence?

Mr. FRANK. Mr. McClanahan, if there is anything there that does not belong there, you point it out to us and show us that we are wrong, and it certainly will be eliminated now just the same as it would be in the beginning when we offered to check up the work with you. We are entitled to know, if you have any criticism, the exact nature of the criticism, and this hidden and dark way of getting at it is not proper and is not fair. We contend that there is nothing in there of that nature, but if there is anything and you think there is anything in there, and will point it out to us and point out here on the examination, we would be very free to admit it if we find it to be correct.

Mr. McCLANAHAN. Q. Answer the question, Mr. Curtis."

We do not intend to transfer to this brief the entire testimony, but only make such excerpts as will place the Court in possession of the point under consideration. The record from where we have just left off up to page 1655 gives the details.

On page 1623, the question is again asked:

"Q. If you have introduced in this case any time cards covering, clearly covering, contract

work, that is an inadvertence, is it? A. Time cards.

Mr. FRANK. What is the use, we cannot understand that, I think the law will presume that it is an inadvertence, unless you prove that we attempted to commit a fraud on you. The object of that kind of examination I cannot understand. If you were in Court you would not be permitted to do this thing for a minute.

Mr. McCLANAHAN. Q. Answer the question. Mr. Frank is through with his discussion."

Again (page 1642), Mr. McClanahan having asked to be favored with our copy of the circulating pump contract, said:

"The purpose of this request is this; we shall contend that in the balance sued for in this suit there is work included covered by these respective contracts.

Mr. FRANK. You should point out the work that is included. We have a right to have that pointed out so as to give us an opportunity for explanation.

Mr. McCLANAHAN. That is outside of the present matter."

The controversy, thus running through the examination, culminated at the end of the examination of the witness (page 1649):

"Mr. McCLANAHAN. That is the end of my cross-examination.

Mr. FRANK. Now, Mr. McClanahan, before we begin in redirect examination, you have made certain suggestions in your cross-examination of certain time cards, or stock cards, bearing numbers which you claim should not be charged in the bill, without specifying what the cards were. I demand now, that you specify the particular cards to which you object, in order that we may be able to examine them and explain them, if they need an explanation whatsoever. You have not specified any of them.

Mr. McCLANAHAN. I decline to furnish to the libellant any fruits of my efforts in examining and segregating the evidence produced by the libellant in this case.

Mr. FRANK. Do you claim that there are cards of the nature which has been covertly suggested in your cross-examination?

Mr. McCLANAHAN. I do.

Mr. FRANK. Then we demand a specification of them in all fairness, that we may be able to examine them and explain them, if they are open to explanation.

Mr. McCLANAHAN. The compliance which you request, if I felt so disposed to comply with it, would entail much labor and I do not care to comply with it.

Mr. FRANK. Very well. Then we will adjourn and refer that to the Court, and see whether you can make those covert charges without giving us an opportunity of meeting them.

Mr. McCLANAHAN. Mr. Frank, this adjournment of the Court is a very serious business with me. Time is the essence of my present engagements.

Mr. FRANK. So it is of mine. I believe I have as many engagements as you have, but I think we are entitled to fair play in this case.

Mr. McCLANAHAN. You are getting fair play in this case.

Mr. FRANK. No, we are not.

Mr. McCLANAHAN. You should know your case, and the exhibits and the evidence you have introduced better than I should. You should know what I know and perhaps more than I know. If I am to examine your case for you so as to enable you to whip it into shape I had better send in for a retainer to the United Engineering Works.

Mr. FRANK. What we should know and what we do know is one thing. We cannot know what you claim, and most undoubtedly wrongly claim to be an incorporation into the bill of charges shown by cards that should not be charged in there. We have



a perfect right to be apprised of it as we have of anything else, so that we may fairly meet it in this case, and not be delegated to an unnecessary controversy hereafter. You should put your case in fairly.

Mr. McCLANAHAN. All of the proof of your case has been presented by you. You should know what it is. You should know that there is not, or that there is, such evidence as I have suggested. If you claim there is not, it is a matter of issue between us to be threshed out on the argument of the case.

Mr. FRANK. If you claim there is, it is up to you to point it out.

Mr. McCLANAHAN. I will do so on the argument of the case.

Mr. FRANK. No. It is up to you to point it out now. Your claim may be ill-founded and be open to explanation by the testimony which would be beyond the reach of counsel on the argument.

Mr. McCLANAHAN. We need not discuss it. I decline to do it.

Mr. FRANK. Very well. We will see what the Court has to say about it. If it says you do not have to do it we will go on.

Mr. McCLANAHAN. Why cannot you go on with Mr. Curtis now and get rid of him except on that point?

Mr. FRANK. That point is very material at the present time. I see very little in your cross-examination outside of that that would require me to examine Mr. Curtis on.

Mr. McCLANAHAN. Well, then, just say that you have no redirect except on that point and let us proceed.

Mr. FRANK. Are you running me again, Mr. McClanahan.

Mr. McCLANAHAN. I am making suggestions; yes.

\* \* \* \* \*

Mr. FRANK. Now, Mr. McClanahan, I think we had better refer this matter to the Court. I pre-

sume 2 o'clock would be a convenient time for you to get the attention of the Court.

Mr. McCLANAHAN. Why cannot we go right up now?

Mr. FRANK. In the first place, I do not think we could get the attention of the Court now; in the next place, I want to get the particular part of the record to refer to the Court, written up, so that we may not waste its time, and present it intelligently.

Mr. McCLANAHAN. Suppose on investigation, Mr. Frank, we find that the Court is not available either today or tomorrow. I object to this case being halted on this ground. I am willing to have you conserve all your rights, but let us make progress. If this is your last witness, I am prepared to go on this afternoon at 2 o'clock with my case and we ought to do it. We have consumed a great deal of time in the case and to consume more unnecessary time it seems to me is uncalled for.

Mr. FRANK. How can it be unnecessary? You specify your cards and that is the end of the controversy.

Mr. McCLANAHAN. I decline to do that. I am willing to have you conserve your rights and take this matter up before the Court at some convenient time, and in ~~your~~ case you are sustained in your contention, to continue your redirect examination with Mr. Curtis. But my point is do not let us delay the progress of the case.

Mr. FRANK. Very well.

Mr. McCLANAHAN. Subject to your right to do that, and subject to your right of further redirect examination of Mr. Curtis, let me begin to put in my case.

Mr. FRANK. That satisfies me, and we will adjourn this matter of going before the Court to some other time.

Mr. McCLANAHAN. That is it exactly. If he is your last witness it is understood that you close your case with that exception.

Mr. FRANK. Or anything that may transpire in reference to his examination that makes it necessary for me to go further.

Mr. McCLANAHAN. On the point in controversy.

Mr. FRANK. Anything that may arise on the further or cross or redirect examinations.

Mr. McCLANAHAN. Yes, subject to that you close.

Mr. FRANK. Yes.

Mr. McCLANAHAN. And we will go on at 2 o'clock at my office.

(A recess was here taken until 2 P. M.)

#### AFTERNOON SESSION.

(An adjournment was here taken at the request of the respondent until tomorrow, Saturday, October 28th, 1911, at 10 A. M.)

Saturday, October 28th, 1911.

(An adjournment was here taken at the request of the respondent until Monday, October 30th, 1911, at 10 A. M.)"

That controversy, in which respondent expressed himself as so anxious to save time and go on with his case at 2 o'clock, being ended, the record shows that, at his request, two further adjournments were taken.

The matter was not referred to the Court for its decision. The reason for this we do not recall, but it was evidently lost sight of because of difficulty in securing a time convenient to the Court to take up such controversy.

It will be noted, too, that, in his present contention, the object of respondent is not to have his claimed *errors corrected* in the bill *by eliminating the instances in which he* claims there is a double charge, but he adopts a method which he thinks will have a psychological effect in moving the Court to entirely disregard the time and



material cards as untrustworthy. He says, "our list does not pretend to be complete" (pages 57-8). "The list is of such magnitude that we have thought best to place it in this brief as an appendix (see Appendix I.) and because the instances of these irregular charges are so numerous we submit that they cannot be explained on the theory of a mistake or an oversight" (page 58).

Again, referring to a similar matter, he says, "While the size of the record forbids an exhaustive examination we have made a *cursory one*, which we believe sufficiently establishes our claim that the situation referred to exists" (page 64). Again, notwithstanding he has already said that the alleged errors "cannot be explained on the theory of a mistake or oversight," he says (page 67). "If this is the situation affecting one of the admitted contracts, there can be no reason for believing otherwise than that a minute examination of all of these hundreds of material cards would reveal a similar situation respecting all of the contracts. We disclaim any intention of charging premeditated wrong on the part of the libelant, for our attack is intended to point out the mistake of counsel in attempting to depend upon proof so loose and palpably unbusinesslike as were these time and material cards used by the libelant."

His disclaimer of intention of charging premeditated wrong does not in anywise fit in with the many direct charges he makes of that nature. The suggestion that he has not made "an exhaustive examination," but that his examination was a "*cursory one*," is, of course, an attempt to add weight to what he claims to have pointed out. His diligence, however, in raising these objections

is so apparent that we think it fair to infer that he has called attention to all that he could "invent." He is certainly not entitled to be credited with "errors" that he fails to point out. We shall presently see how palpably unfounded those objections are.

We have already said that this criticism is not directed to having the bill *corrected* and the reason is apparent, for, if he were to receive credit upon the bill for the instances in which he claims that improper charges were made against him, the amount of the credit would be so insignificant that it would make his contention of "hopeless error" ridiculous. Taking his Appendix I., for instance, he enumerates 113 instances of alleged error in Schedule 1. We will hereafter show that some of those 113 alleged instances are not charged at all in Schedule 1, but only appear upon the cards because other proper charges appear upon the same card. We therefore could not throw out the cards, we could only throw out that particular charge. That was done in making up Schedule 1. It will also be borne in mind that the instance in which he claims there are double charges are not in fact double charges, as we shall hereafter indicate. This matter is treated in our Appendix 2 *post*.

However, assume for the present that they are double charges. Out of, as he says, "thousands of cards," he finds 113 instances. The entire time included in those 113 instances, putting it at the extreme, amounts to \$602. This can be verified by checking it against our Appendix No. I *post*. This amount in bill of \$30,000 odd

would not be serious enough to cause the entire proof to be disregarded.

We do not know how carefully this Court will be able to examine into these details, but we have the assurance of the District Court that he has given "careful consideration to the voluminous record" and that "while the manner of keeping the accounts of the different men engaged in the work and of the different articles furnished is somewhat complicated, I think that, with the exception now to be noted, the account as stated in Schedule 1, 2 and 3 of the libel is correct" (page 2596).

However, so that this Court, if it deem it necessary, may follow these cards *seriatim* to ascertain their verity, we have added, as Appendix I of this brief, a detail of each card introduced, showing the name of the employee, his shop number and his classification, together with the day and the hours worked by him, and the entire matter carried through to the end, with a summary of the number of hours worked upon the job for each classification of workmen.

There can be no dispute with respect to the manner in which these cards were finally prepared as a record.

Let us take, as an illustration, the case of the machine shop, presided over by Mr. Adamson, concerning which so much is said in the brief.

Mr. Adamson was not the foreman of the machine shop at that time, but was an *assistant* foreman, (V. I, page 302). It is safe to assume that when a man specializes upon a particular kind of work, if he be a man of intelligence and capacity, as Mr. Adamson un-



doubtedly was, he becomes expert in the things necessary to carry it on.

Much comment is made in the brief about not appointing men specially to take care of this time. Apparently the fact is overlooked that that was *the very office that Mr. Adamson fulfilled*. Previous to the appointment of Mr. Adamson, Mr. Doig, the foreman, had been keeping time on these men (page 339). Mr. Adamson's position as assistant foreman *was created for the very purpose of keeping said time*.

“Q. What was the occasion of making the change? \* \* \*

A. Because it was found that it was too much for one man to keep track of all the numbers and check the jobs that came in and oversee the work being done at the same time.

Q. When you say ‘keep track of all the numbers’ do you mean keep track of all the——

(Intg. by an objection.)

A. I mean by seeing that the proper number was put on each job as it came into the shop.

Mr. FRANK. Q. How about keeping the proper time of the man?

A. And that the proper time was checked off that was put on that job every day.

Q. By the men? A. No, sir, by me.

Q. I do not mean checked off by the men, I mean the proper time that each man put on the job was checked off?

A. That was my duty to see that these men's time was properly put down and that it was properly checked and the time they put on each job.

Q. In other words, the duty of keeping the time of the men on each job was the duty that was assigned to you?

A. That was assigned to me; *this position that I held at that time was created absolutely for the*

*purpose of keeping the proper time on the separate jobs as they came into the shops, and check off the time that was put on each job.*

Q. You said something about a place table being put into the shop at that time. A. Yes, sir.

Q. What was the purpose of that place table?

A. So that I could *lay off* all the work on any job that came into the shop, and so that I could be handy right at the door where the jobs were landed, and my attention was drawn to the job as it was put down, and it was my duty to find the proper numbers of that job and paint it on with white paint before it left my table. \* \* \*

Q. And then you took it, and did what with it?

A. It was assigned to the man who was to work on it.

Q. Who assigned it?

A. I drew the foreman's attention to it and if he could not take the job at the time he told me who to give it to.

Q. Then what did you do—give it to the man?

A. Yes, sir, who was to work on the job.

Q. And take his time? A. And take his time" (pages 339-40-41).

In other departments where less men were employed, the foreman kept the time. On the ship both foremen and Putzar kept the time.

In addition to this each man kept his own time, some by noting the time they received the work and the time they finished the work upon their machine, others by noting it upon a separate piece of paper and others by making mental note of it, and these notes were transferred to the card in the evening at the conclusion of their work.

The card was then turned into Adamson and by him turned into the office. The next morning, the first thing,

Adamson went into the office and checked the time so entered by the men by their cards with his own recollection of their time. Respondent declares that Mr. Adamson's ability to do this "leads one into the realm of things 'phenomenal'" and "is preposterously absurd." Of course these adjectives mean nothing. Not only does respondent assume that Adamson's duties were more numerous than they in fact were, but he also ignores the fact that this matter of time was the man's special duty, it was the matter for which his position was created and for which he was specially employed, as shown from the foregoing citation from his testimony. With this fact in mind there is nothing phenomenal or preposterously absurd about his ability to accomplish it. It is the every day experience in practical affairs of life with respect to men who specialize upon a certain thing. Moreover, the adjectives lose their force when we consider that that method was continued at the works right up to the time that the witness was testifying, and gave satisfactory results. As we have already suggested, the very existence of the institution depends upon its practical accuracy, for without it the United would not be able to ascertain its cost of production and anyone who has the slightest knowledge of a manufacturing industry knows that it cannot be carried on, on such a scale as the United's business, without that data being accurate.

The fact that some of the men working on the machine were not able to do the same thing, argues nothing to the contrary, for not only were they not men of the



same intelligence as Adamson, but also they were not specializing as he was upon that particular thing.

The instances given to illustrate the fact of the "calibre of Adamson's mind" would not at all warrant the inference attempted to be drawn therefrom. Not only did they refer to matters occurring two years before the witness was called upon to testify respecting them, but they were also not matters upon which his attention was riveted as was the matter now under consideration.

We think, however, that a reading of his testimony would convince any impartial observer that the "calibre" of his mind was good.

At the time that Adamson checked up these cards, his mind was fresh upon the subject that was his particular duty. And the cards indicate the *corrections* that were then made of errors on the part of the *men* in making their entries. In making these corrections his memory was assisted by special inquiry made at the time into the detail affecting the things that he conceived to be errors. It was further assisted by the rechecking of the same cards by Mr. Curtis, who followed his work. Although Mr. Curtis would have no personal knowledge of the length of time of the individual workmen were employed upon a particular job, he had the whole job under supervision, followed it closely from day to day and himself went with the cards, in case of doubt, into the shops, consulted the men and consulted the piece itself upon which work was performed in order to insure the accuracy of the record, and in doing this he was fol-

lowing out the purpose of his own employment as the head man upon whom rested the responsibility of obtaining the record upon which the United depended for its own knowledge of the cost of production. For this, respondent attempts to cast slur upon him as the "chief clerk" who injected "himself into the minute and detailed business of his employer" (brief, p. 80).

Comment is also made, occupying several pages of the brief, upon the fact that there were days in which Adamson was not present at the shop and there was work during the night hours when he was also absent.

So far as night work is concerned, there would be very little trouble in Adamson following it. He was an expert workman, otherwise he could not be assistant foreman. The night work of these men would in general be confined to a particular piece of work which Adamson laid out for the men before leaving the shop. As he himself testifies, and as any reasonable man must conceive, from his experience he would have a reasonably accurate knowledge of the length of time it would take to complete that piece of work, and, when he consulted the entry of the men's time in the morning, he would know with reasonable accuracy whether or no it was correct. He then had the same facility and probably more incentive to make direct inquiry into the matter by entering the shops for that purpose and verifying the entry.

However, apprehending the question that would be raised by respondent respecting this time as well as the time that Adamson was absent from the works we took

the precaution to *specially call the particular men who had worked upon the Hilonian job during the time that Adamson was so absent* and to have them testify directly with respect to that particular time. Upon the testimony of these men, respondent has no particular comment to make, except to indicate the manner in which they kept track of their time. Some of them did it mentally, some of them used a slate, some of them a piece of paper, some of them a time card and some of them a private book, but we submit these facts do not impugn the accuracy of the records they made.

It is, however, suggested that their testimony affects the credibility of Adamson, because some of these men testified that they passed their card into the timekeeper, and respondent assumes that therefore Adamson did not check them, but the timekeeper checked them. Adamson has directly testified that he did this checking *in conjunction* with the timekeeper, while the men themselves were never in the office during this process of checking, but in the shop at their work. An examination of their testimony, upon this subject, will disclose that what they said, in that respect, was their mere inference or assumptions, and not from any personal knowledge. It does not, however, in anywise tend to discredit Adamson, who was testifying as to what he himself did, of which they knew little or nothing. For confirmance of this, we refer to the other pages of the testimony referred to in respondent's brief on page 51 thereof. For instance, Stimel says, when asked who would call his attention to mistakes, "The timekeeper would call my attention. *He would call the foreman's attention*



and the foreman would call me to him and then I would have to find the regular time." All he knew of his own knowledge was that the foreman called him (meaning Adamson). As to who called Adamson's attention to the error is only an inference. So again on page 21 and 22:

"Q. Then I suppose if there was any mistake the next day the timekeeper would call your attention to it?

A. He calls the foreman's attention to it and the foreman calls us."

So too with Wilson, whose testimony is quoted on page 80 of the brief; but immediately preceding, on page 79, when he is asked concerning what he did with his cards, he says he placed them in the box.

"Q. Do you know where they went to from the box?

A. To the timekeeper *I should surmise*, in the office.

Q. Do you know? A. I cannot say anything else."

It will be noted right here that this examination, by respondent, is intended to show that Adamson did not check the cards *before they went into the office*. He does not claim that he did, his testimony was that he went into the office the next morning and checked them there in the presence of the timekeeper.

So with Mokel, page 805:

"Q. Nobody checks your time except yourself?

A. Myself, that is all, before I hand them in.

Q. When you handed it in, it passed to the office? A. Yes."

When asked respecting the change or correction made in red ink, he says: The timekeeper would come to him and together they would go over the piece of work and find what the number was. That they would talk it over and he told him that he had a mistake, he would show him everything “and then we decided that I have made a mistake in getting down *the numbers*.”

This does not exclude the proposition that the timekeeper's attention was called to it by Adamson, before the latter had his interview with the workmen for the purpose of verifying Adamson's opinion. It will also be noted that this refers only to a mistake in a job number, and *not to the hours worked*. The timekeeper would have a knowledge of the job numbers as well as Adamson, for those job numbers came to Adamson from the timekeeper.

So with Thomas (Vol. III, page 789). He says he dropped his card in the box at the timekeeper's office.

“Q. What became of the time after that?

A. The foreman went over it *I believe*, and checked the time to see if it was correct and the timekeeper also *I believe*.

Q. You do not know anything about that, do you? A. No, sir.”

After an attempt, on page 790, to exclude the foreman from the examination, the matter culminates on page 791 with the following answer:

“Q. No one but yourself knows how much time you put on each particular job?

A. *The foreman would know who gave us the work, he would naturally know how much time were spent on it.*”

So with Schafer (Vol. III, pages 796, 797). This witness testifies:

“Q. Nobody keeps track of your time while you are working, except yourself?

A. Yes, and the timekeeper and the foreman.”

And he is led to say that the foreman is David Doig. On the next page, however (page 198), he says he does not know if Robert Adamson was acting at this time. He had been in Europe fourteen months and could not remember

“if he had charge of those books then or not. David Doig did that before Mr. Adamson did it. It may be that Mr. Adamson did that at this time when we was working on the Hilonian.”

So with Muller (page 844):

“Q. No one looked over them to see if there was any mistakes? A. They did look over them, yes.

Q. Who does? A. Mr. Adamson at the time.

Q. At the time? A. Yes, sir.”

He further says that he turned them into the office and that he was told that Adamson looks them over, and he goes on to show how corrections are made.

So with Young (page 854):

“Q. Nobody checks over your time, do they?

A. Not so far as I know.”

So with Mr. Boyer (page 896):

“The timekeeper makes the change; he came around in the morning and made the change, *I think.*”



If the foregoing is evidence that "it was the timekeeper and not Adamson who made these corrections when there were found mistakes in the time," so as to contradict Adamson's testimony that in the morning he went into the timekeeper's office and checked up the cards, we fail to appreciate it.

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ADAMSON'S PERSONAL CARDS OF AUGUST 25th, 26th,  
SEPTEMBER 7th AND 18th.

Comment is made upon the fact that these cards were not produced, though it is admitted that Adamson was at work in the shop on these days as it is shown by his clock card. It is contended that, inasmuch as Adamson identified the cards of the men who worked on that day, the nonproduction of his *own personal* card leads to the inference that Adamson himself did not work *on Hilonian work* on those days, and it is argued that if he did not work on Hilonian work himself he had no means of keeping track of men who did work on Hilonian work. It is suggested that it was *solely* because of his personal handling of Hilonian work, marking it off on the surface table and thereafter turning it over to the men, that gave him the opportunity for the supervision which he claimed.

In the first place this latter statement is not the fact. The surface table was used for numbering the jobs *as they came into the shop*. After it had passed the surface table in this manner the work might remain in the shop for several days and, if respondent's inference were true, Adamson would not have track of the work

beyond the first day nor even track of the work as it changed hands in the shop during that day. This contention, as to his means of keeping track of the work, is based upon a single sentence in the testimony and closes its eye to the further statement that, keeping track of the men's time was the special business of Adamson, the very purpose for which he was appointed, and the surface table was only referred to as one of the means to that end (Vol. II, page 340). Take, for instance, the example of the craneman included in the list mentioned by respondent. He handles the pieces in the shop from time to time as they are being worked on by the machinists. If respondent's contention were true, Adamson would have no means of keeping the craneman's time. But he did, in fact, keep his time.

If Mr. Adamson had means, independent of the surface table, of keeping track of the time in the shop, the entire purpose of respondent's calling attention to these cards has failed.

However, if the "Hilonian" work upon which these men were working on those particular days, was work that had been laid off the day previous, and of such magnitude as would occupy the entire day, Adamson would have no occasion to enter, on his own card, time against that work until it was finished, as no appreciable part of Adamson's time would be occupied in taking note of time when the workmen quit, and from a practical standpoint, that would not reasonably permit of time being charged. This is quite as reasonable as any inference respondent attempts to draw.

On the other hand, there are about 1200 cards introduced in evidence here, which have been selected and segregated from many thousands. That four cards, that should not have been discarded, or destroyed, should have been lost in this segregation, is not at all remarkable. Neither is it remarkable that no explanation of the failure to produce, appears upon the record, for the controversy took place on August 25th, and the libelant's case was concluded upon October 27th (pages 1654-55). Without doubt, owing to the multiplicity of matters occupying the libelant in the prosecution of the case during that time, the explanation was forgotten; for it will not be assumed that otherwise the libelant would not have offered *some explanation*, even if "counsel" had "not dared to give" the one suggested by the respondent.

The contention is also made that, if Adamson's cards show "*Hilonian*" work, then the bill is *incorrect to the extent of the value of the unknown number of hours that Adamson worked*, as shown by these withheld cards. Of course, that is not a matter of complaint for the *respondent*, because, if incorrect in that respect, *the error is in respondent's favor*, and the loss is the loss of the United—those hours not being charged in the bill.

It is not contended that the time of the men mentioned on page 43 of the brief was not proven, for it will be remembered that a large number of Adamson's exhibits were resubmitted to the men themselves, to prove their verity both with respect to overtime, night



work, and work covered by the dates mentioned. We make this suggestion now, so that the Court will not be led into error with respect to the men's time.

We might pass the statement that "counsel dared not give that as a reason for their non-production"—referring to the fact that the cards contained no charge against the "Hilonian"—with the suggestion that we cannot blame respondent for judging of our motives by his own standard. We can only point to the fact that their transactions disclosed by the record, forbid our being placed upon the same footing.

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**THE ALLOWANCE OF NINE HOURS FOR SHOP WORK WHEN  
BUT 8½ HOURS OF WORK WAS ACTUALLY PERFORMED.**

The contention of respondent upon this subject is again an evidence of his unfairness in his treatment of the case. Not only does he make use of it in his attempt to discredit our timekeeping, but he also, with full knowledge that he is adopting improper rates, uses the price set opposite the time in Schedule 1 as the proper price of the labor, *when applied to the hours actually worked*, and says that, in the figures of his experts they "adopted libellant's *own rates* for the same, as shown in its bill" (brief, page 186).

The reason for this extra allowance of time is plainly set forth in the testimony, and uncontradicted (Hough, Vol. IV, pages 1348-1352). But respondent calls it a "palpably inequable overcharge," and says it arises from an agreement

between respondent and the labor unions, by which the respondent was obliged to pay its workmen in that manner. It would seem, if the United were obliged to pay its workmen in that manner, the extra charge is an element in the cost of the production of the article worked upon, and if it cost us that much to produce it, it certainly is chargeable against the customer, when working on a "time and material" job.

He then suggests that "counsel designates" this agreement as a *custom*, and that the custom was not known to the Matson Navigation Company. That it is the general custom applying to all iron works around the Bay engaged in the business, is established by the record without dispute (III, p. 919). To say that the Matson Navigation *Company* did not know it, because one of its officers testifies that he did not know it, is ridiculous. Before this job, respondent had been having work done covering a long period of time in which bills so charged had never been disputed, and Mr. Curtis testifies that this method of charging was explained to his timekeeper when the latter went upon the job.

But aside from the question of "custom," we contend that the reasonable value of a piece of work is what it costs to perform it at the time and place it is performed, and all incidents that are common to those engaged in that class of work, which enhance the cost, become thereby an element in that reasonable value.

It is also suggested that the agreement is enforced against the respondent for non-union work, as well as union work, and this is based upon the fact that Dolan

said he was a non-union man. Perhaps in this connection, we might suggest *de minimus lex*. But there is no evidence that Dolan was paid on any other basis, on the contrary his time card shows that he was paid on exactly the same basis and the record shows it "was the rule of the shop" (III, page 920). No other conditions could obtain in the works; to do otherwise would foment internal strife and disorganization.

Then it is said that it is inequitable, because the extra time for which the men are paid includes overhead expenses, and a profit, and that each hour of unemployed labor billed to the shipowner gives the iron works not only reimbursement for what is paid the workmen, but also a fictitious profit, for which the shipowner receives no benefit. This is drawing the matter rather too fine. The profit that the iron works obtains from a given job is a gross amount; it is the difference between the cost of performing the work and the amount it receives. It is ascertained by taking the latter amount, and deducting therefrom a percentage for overhead expenses and the actual amount paid to the workmen and for the material. The amount that it is increased by the bonus to the workmen may be lost in the cost of the material and the necessarily imperfect determination of the overhead expenses applicable to the particular job. Such refinement in the practical affairs of life would make the carrying on of factories impossible, and we doubt if any Court would attempt to constitute itself a commission for the readjustment of the great industrial methods of accounting, upon the mere suggestion that it does not operate with machine-like precision.



Before such work is undertaken, an enormous amount of special knowledge upon the subject is necessary.

But, aside from this, the profit argument is not sound, because it assumes that the unemployed hours are paid for *at normal rates*, which is not the fact. *Unemployed hours are offset by a reduction in the rate per hour.* It is a mere method of accounting. We have two multiples that give a given result; one, the number of hours employed, the other, the rate. If you increase the number of hours employed, and decrease the rate, the result is the same as if you decrease the number of hours, and increase the rate correspondingly. So that, *the result being constant*, it is immaterial whether the hours so increased be employed, or unemployed. The profit lies only in the *result*, the gross sum, and not in either of the factors. Under the present arrangement, there is no profit in the *rate per hour*. For example, 10 hours at 65¢ is \$6.50, so also 8½ hours at .7644+ (running into tenths of a mill), is also \$6.50, but what a wage rate to keep books on! The profit is in the \$6.50 in both cases.

Then again it is said that there was no governing rule as to how this unemployed period of time was to be divided in cases where several job numbers were operated on in one day, and that this is "*also fatal to libelant's case*" (page 56). It is really wonderful how many fatalities the libelant was confronted with, which the District Court failed to regard as fatalities.

The Court will notice that many, if not the majority of the cards in question carry as many as four different

job numbers on a single day. Thirty minutes distributed among that number would mean about 7 minutes to each job. Ninety minutes so distributed would mean about twenty-two minutes to each job. This would be the worst feature of it. In the case where a single job number is worked on an entire day, there would be absolutely no difficulty. To suggest that the men themselves could not arrive at this pro rating with reasonable accuracy for all practical purposes is simply hunting for difficulties. But when we take into consideration that their time was supervised and re-checked by both foreman and head clerk, the difficulty is reduced to a minimum. We do not feel that this "fatality" need disturb us.

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#### OVERTIME.

Upon this subject respondent says: "If at the expiration of eight and one-half hours, he should work for half an hour longer, the result would be that the total hours *worked* would be nine, and yet *respondent is billed for nine hours of straight time and one-half hour 'overtime'.*"

This he does not assign as "fatal to libelant's case," but this time it "is adding insult to injury."

Let us see: *Overtime* is charged for at *double rates*. For instance, if a man is receiving 65¢ an hour for *straight time*, he is entitled to a \$1.30 for *overtime*. In the keeping of these accounts, however, a 65 cent rate is kept constant and the *time, instead of the rate*, is

doubled, so that, if a man works 1 hour overtime, his pay is \$1.30. In the account, however, it appears as 2 hours overtime at the rate of 65¢, again equalling \$1.30. We have illustrated this under the discussion of its effect on "profit."

Now, apply that to the instance given by respondent.

"If at the expiration of  $8\frac{1}{2}$  hours he should work for half an hour longer, the result would be that the total hours worked would be nine, and yet respondent is billed for nine hours of straight time and *one-half hour* overtime." In other words, respondent is billed for nine and one-half hours time at 65 cents an hour, which equals \$6.17 $\frac{1}{2}$ . If, however, the *rate* had been doubled, instead of the *time*, the charge would appear thus:

$$\begin{array}{l} 8\frac{1}{2} \text{ hours at } \$ .65 = \$5.52\frac{1}{2} \text{ and} \\ \frac{1}{2} \text{ hour at } 1.30 = .65 \text{ which,} \end{array}$$


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being added together, = \$6.17 $\frac{1}{2}$

It thus appears that respondent has himself again "added insult to injury" by leaving out of his statement *the fact that the one-half hour of overtime is paid for at double rates.*

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#### MISCELLANEOUS IRREGULARITIES.

These will be considered in an appendix to this brief.

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#### PUTZAR'S POSITION, AND HIS RELATION TO THE PARTIES.

In his treatment of this subject, respondent has done some artistic work.



Putzar's time sheets are prima facie evidence of the facts to which they purport to certify. They are also supported by the testimony of Curtis. Libelant, therefore, does not require Putzar's testimony in the case. Knowing this, respondent plans to destroy their effect, and his first move is an attempt to remove from his own case the presumption which, under the law, rests against him for failing to call Putzar in his own behalf. He acknowledges that he could have had him, had he desired, but excuses himself upon the ground that *nearly a year after the transactions now under consideration*, he sent for Putzar, who then told him over the phone that, if called upon, he would give his evidence, and it was not necessary "for me to interview him." To this he adds, as a make-weight, that he asked Putzar if there were any differences between himself and Captain Matson, to which Putzar replied, "he didn't like Captain Matson's treatment of him in failing to give him recommendations to the Portland Steamship Company."

On this slight incident respondent bases his excuse for not calling a witness, who, he contends, is one of the most important in the case. This slight incident he also uses as a foundation for an attack, not only upon Putzar's record as a time-keeper, not only upon Putzar's personal honesty, but upon the honesty and integrity of everyone connected with the case of the libelant. He refuses to call the witness, but asks other of his own witnesses whether or no they saw Putzar on the ship, or checking the men off at given times, to which they replied "I didn't see it", or, "I never saw it". Upon what

his own witnesses say they “didn’t see”, he attempts to build a theory that Putzar did not perform his duties with respect to time keeping. After diligent effort in this line, along with imputations of fraud and wrong doing, he concludes that he has *cast such suspicion upon Putzar* and his record as to make it incumbent upon the *libelant* to call the witness. His theory is, that in view of this proceeding upon his part, the libelant must call Putzar to repel these false charges or stand convicted under the legal presumption that *our* failure to call him is a “failure to make proof when you have it within your power to do so.” Throughout this tirade upon Putzar’s relations to the libelant, respondent indulges, as in other parts of his brief, in every unfavorable inference he can invent by the partial use of testimony and the refusal to recognize any evidence of fair dealing or favorable inferences that will not serve his malignant purpose.

Our review of those attacks, which we shall presently undertake, will show that they are unfounded, many of them so palpably unfounded that respondent must have known it when he made them, and we will then leave it with the Court to say whether the presumption referred to applies to the libelant, whose case is perfect without the help of Putzar, or to the respondent, whose servant he was, and from whom it could have ascertained the truth, if it was truth it desired.

In the beginning, respondent lays down the proposition that Putzar’s employment was limited; that he was to be a timekeeper on the job, but that the real pur-

pose of his employment was to ascertain the saving on the crankshaft if it did not have to come out; though, as matter of fact, he was made timekeeper on the "whole job", and throughout the record there runs a complaint that he did not keep "shop" time as well as "ship" time. Back and forth they go, from one position to another according as the particular contention then under consideration requires.

It is undisputed that Putzar was to succeed Klitgard as the engineer of the vessel. Inasmuch as the vessel when repaired was to be under his care, he was, in that relation, more interested than Klitgard, the outgoing engineer, in seeing that the work was properly performed, for he was to have the responsibility of its proper operation at sea. He was appointed to that position *a week before she went to sea*. (Saunders, Vol. V, page 1777). She went to sea immediately upon the completion of her repairs (Vol. V, page 1777). We thus find him in actual authority as chief engineer at least a week before the repairs were completed.

Again, it is undisputed that Captain Saunders introduced him to Mr. Christy (page 1286) as "their adviser on that job and what Mr. Putzar advised them to do they would do". Respondent "suggests" that Christy is responsible for Putzar assuming that position of "adviser", and encouraged it (brief, page 94). But why Christy responsible? Why not Saunders, Matson's representative, responsible? Did he not initiate the idea by so introducing Putzar? If this were not true Captain Saunders was at their disposal to deny it.



That it was true is shown by the testimony of Klitgard, Saunders, Siverson, Wilhelmson and in fact everyone directly connected with that work. That Klitgard, upon whom now they desire to settle the authority, thus conferred upon Putzar, always consulted with him as the work progressed, and that in such consultations Putzar's opinion at many times had the controlling weight, is also undenied. Siverson so testifies and Klitgard does not deny it. Saunders knew this and, if it was done without authority, why did he permit it?

Why should respondent now, in his brief, be so anxious to limit the authority of this man to the mere capacity of checking the time and reporting the time so checked to the president of the Matson Company? Even if this express authority had not been conferred upon him in the manner we have indicated above, there is known to the law what is called ostensible authority derived from the manner in which an agent is held out to a third party. That Mr. Putzar had the extended authority for which we contend, no one reading this record and having in mind what was done during the progress of this work can for a single moment doubt. So when respondent begins his argument with the assertion that "no other authority was given him except to keep time on the ship's repair work—on the whole job" (page 74) he starts with a false premise.

Now with regard to Putzar's relations with the United. No one connected with the United, except Mr. Gray, is suggested as having known Mr. Putzar before this job was commenced, and it is undisputed that

Mr. Gray knew him only casually (Gray, Vol. VII, page 2348). At the time the timekeeper was selected Mr. Gray suggested three different men, but Captain Matson is not sure but that he himself suggested Mr. Putzar (Matson, Vol. V, page 1663). Notwithstanding that, Captain Matson afterwards testifies that Gray said that there were only three men whom he would allow to act as timekeeper in his yards and Putzar was one of them (Matson, Vol. V, page 1697). Gray not only denies this (Gray, Vol. VII, page 2347) and says it is a matter of indifference to him, but the suggestion is ridiculous upon its face, because the timekeeper represents the customer and Mr. Gray might as well have said that he would not have the customer personally supervise it.

But Captain Matson does not rest upon the suggestion of Mr. Gray respecting the desirability of Putzar for that position. He goes to a close friend, Mr. Samuels, in whose employ Putzar had been for years, and makes inquiry of Mr. Samuels respecting the man. Mr. Samuels says "he is all right" (Matson, Vol. V, page 1697). When asked if he would undertake to say that Putzar was not a man of the highest integrity and skill in his profession, Captain Matson says, "I decline to answer" and attempts to carry out respondent's present imputation that perhaps he was not, notwithstanding that Matson had received assurances from Mr. Samuels in whom he has every confidence, that the man was all right, and notwithstanding there is not a word of testimony

offered in the record against the man's reputation for absolute integrity. It seems that if there were even so much as a suggestion afloat against this man's integrity this diligent and malignant litigant would have ferreted it out and produced it in this record to go along with his other insinuations and unfounded charges against the man's reputation. But no; he must be in collusion with the libelant because a year afterwards this man does not submit to an interview with counsel! What occurred at the time of that request we do not have in detail. We are only told what, in the words of the witness telling it, is the "gist of the conversation" (page 2199). When we have in mind the intense partisanship of that witness as shown by this record, when we have the manner in which the experts report was amended as told at the same time, we may be excused for the suggestion that the incident lost nothing by the mental transference into the "gist of the conversation". It is said that Putzar replied that he did not care to call on him and at the proper time, if called upon, he would give his evidence in this case and "it was not necessary for me to interview him". There may have been many good and honest reasons why Putzar did not care to call upon him. It does not necessarily follow that he had a sinister motive in declining to do so. His employment or his work at that time may have been such as to render his attendance upon counsel very inconvenient.

In this connection it will be observed that the record shows the respondent deemed Putzar *necessary* for



*their case.* The excuse they make for not calling him also shows upon its face that they feared that if they did call him his testimony would not bear out their contention. We do not have to resort to a presumption of law for that conclusion. But why did they fear him? Can it be that his report in their possession did not square with their new contentions in the case?

Then we have the flourish at the close of the case which respondent refers to as "interesting". (brief page 75). After all the testimony had been closed respondent suddenly recalls Mr. Curtis and asks him whether or not Putzar is in the United's employ and finds that he is and had been in such employ for about *six weeks* and that *previous to that time*, up to the time of coming into such employ, *the United had nothing to do with him.* What an incriminating circumstance that is? The taking of testimony was under way from August 15th, 1911, until May 9th, 1912. The work, out of which the present litigation grew, was finished in Sept. 1909. Between the time the work was done and the time that Putzar entered the employ of the United is just short of *two years and eight months.* Two years and eight months after the circumstances arose there is no connection between the United and Putzar, but at the very end of a long drawn out piece of litigation this skilled mechanic, whose services are free to whoever desires to employ him, finds himself with the United! Does respondent regard this as "interesting" because he regards it as evidence of intimacy between the parties that would tend to prove fraud and collusion two

years and eight months before? Or does he regard it as "interesting" because the man being then in our employ is regarded as a man whom the respondent could not be expected to call, notwithstanding that *during the time the respondent's case was put in he was not in our employ?* Or does respondent regard it as "interesting" because at that time we knew where he was to be found and therefore could have called him if we desired? Or does respondent regard it as "interesting" because it discloses that *he also then knew* where the witness could be found and could have called him if he had so desired? The respondent, who seems to have such a keen scent for "hidden humor" may perhaps find some "hidden humor" in the foregoing suggestions.

But let us not lose sight of the purpose for which respondent lends himself to this course. His purpose, as he says, is that, "In view of the very serious attack made on Putzar's time books and sheets as shown by the cross-examination of Curtis, and in view of the relation existing between the libelant and Putzar, a relation which *culminated in entering their employ during the pendency of the hearings in this litigation*, we submit that it was clearly incumbent upon libelant to have called Putzar to the stand to clear up some of the vital defects in his work, as shown by the time sheet record, and that he was not called carried with it an inference which does not help the libelant's case" (brief, page 76).

With this statement of respondent's purpose let us examine the record. It will show that we did not need Putzar for that purpose.

Now what were the relations between these parties, other than those already considered, that are supposed to cast suspicion upon the integrity of their transactions?

Why, it is said that Putzar *copied* the time indicated by the time *cards* into his *time sheets* that are the *final permanent record* of the time. Let us examine into that. That Putzar kept an independent time book is not disputed, though a great fuss and stir is raised because Captain Matson could not find it. Why did he not ask him for it. No one testifies that he asked him for his *time book*. He asked him for his *report* upon the time Vol. V, page 1708) and respondent had a report which Matson says he did not look at and the nature of which the record does not disclose. He says that what he wanted was Putzar's time book—the pocketbook that he carries around with him, but only *asked* him for the *report* (Vol. V, page 1708). But if a *time book* was essential, Putzar's time book *was not the only one at his disposal*. Klitgard was on the job all the time and he carried one; Kinsmann carried one and “everyone connected with the job of that description” carried one (pages 1872-73). But Matson did not want Putzar's hand book. That is an afterthought. He really did not want anything. He was just mad about the transaction.

Now we say it is admitted that Putzar kept an independent record in a handbook. If he kept such a book the presumption is in favor of its integrity. Now, how do they attempt to meet that presumption? Why they bring witnesses who say “they did not see him take the



time". That kind of testimony does not go very far. Kinsmann "who did not see" was otherwise employed. Attempt is made to place Kinsmann in a position where he would be able to identify the work done in the engine room, which was the subject of the specification work; so that he would be able to point out to the experts the work done on the tank top and the work done at the windlass and explain to them the work done on the gudgeons, on the propeller shaft and on the propeller. Indeed Kinsmann must have been omniscient. But the fact appears that Kinsmann was at work with the *ship's crew in the boiler room* repairing the auxiliaries, with which work the United had no concern (Vol. VI, page 1992). His position on the ship was an inferior position that carried no responsibility for this work and with which he had no connection. Klitgard had many duties to perform *but the supervision* of Mr. Putzar *was not one of them*. Saunders was at the yard some times and much of the time he was not at the yards.

But it is said that Putzar was not present "during the 23 nights on which his time sheets give detailed recitals of the names of the men working, the character of the work they were engaged in, and the hours worked by each" (brief page 88), and Kinsmann is supposed on two occasions to have seen him leaving the works at the close of the day.

Let us not forget that there is a great difference between keeping time on the ship, and time in the shop. While in the shop there was work, other than this particular work, going on, upon which the men worked dur-

ing the same days that they did "Hilonian" work, *on the ship* they did *only* "Hilonian" work. Therefore, the method of keeping time on the ship is not so intricate as the method of keeping time in the shop. The only segregation necessary with respect to time on the ship is, that required between contract work and time and material work. When, therefore, a man is set to work upon the ship, there is not the same necessity of keeping track of him throughout the day that there is when he is working in the shop. With reference to the work upon the engines, that being the principal repair, after it was determined that, by virtue of the changes in the specifications, all that work was to be done under a single heading, segregation was no longer necessary, and when the men were put to work in the morning in the engine room, if they remained there at work during the day, so far as time is concerned, they required no further supervision. So far as other matters were concerned, Klitgard was present to supervise.

The *night shift* in the engine room *had a special work to perform*. They were detailed to this special work because it could not be done to advantage in the day time, due to the interference of the workmen on other jobs (Vol. IV, pages 1187, 1188).

These men were checked off when they went to work in the evening, at which time Putzar was present. In the morning they were checked off by the night foreman and the day foreman, in which checking, again Putzar was present to take part.

Now, let us consult the 23 sheets that cover the 23 nights here in question. The sheets are dated on the top, and the Court will find it underneath the spring binder of Curtis' Exhibit No. 3 and also Respondent's Curtis' Exhibit No. 4. In Curtis' Exhibit No. 3 the sheets are also numbered on the bottom, in a circle. They are as follows:

Aug.	24	Sheet	3
	25	"	5
	26	"	7
	27	"	10
	28	"	12
	29	"	14
	30	"	17
	31	"	20
Sept.	1	Sheet	23
	2	"	26
	3	"	29
	4	"	31
	5	"	34
	6	"	37
	7	"	39
	8	"	44
	10	"	49
	11	"	51
	12	"	54
	13	"	58
	14	"	62
	15	"	66½
	16	"	69



It will be noticed that the work on all of these nights *is homogenous work*; that is, each man noted on the sheet worked the *entire time upon a single job*. So, when the time and job number were taken as the men entered upon the work, no further oversight to segregate their time was necessary.

It will be further noted, that the men worked from 13 to 16 hours, and on holidays, 26 hours, excepting only two instances on the last day, when one man worked 6, and another man 10 hours. The 26 hours on holidays represents 13 hours. These charges included, of course, the bonus time.

Henry Nelson, the night foreman, confirmed this. He says: The particular piece of work to be performed at night was laid out for him by the day foreman, and that his work was confined then to a particular piece of work during the night, and to a particular part of the ship.

“Q. How about the length of time that the men would work in the night time on a single job, whether it was continuous, or whether they were passing from one job to another?

A. My work was for the most continuous. It was under all one continuous job. There are a few instances where they passed from one job to another, but I don't remember just how many. I don't think there were very many” (page 1188).

There was also some nightwork done *after Mr. Putzar was appointed engineer*, during which time it is conceded that he was on board. This was finishing up work, and is probably the time referred to by Mr. Nel-

son when "There were a few instances where they passed from one job to another" (Vol. IV, page 1188).

What now shall we say with respect to respondent's "challenge" to counsel (page 88), and with respect to the inference "so strong that it was incumbent on counsel to overcome it if possible" (pages 88-89).

What, under these conditions, was to interfere with Mr. Putzar's taking accurate note of the men when they went on work in the night, and again checking them off when they left work in the morning, and thus keeping proper track of the work so performed?

And this manner of keeping that time must have been well understood by the respondent when it appointed its timekeeper, for did he expect Mr. Putzar to stand watch over all of these men all of the time that they had worked,—for each of 23 days out of 27, to stand watch over that work for 24 consecutive hours? Of course not. It remained for the ingenuity of counsel to scare up this alleged objection by substituting a suggestion of an utterly impracticable method, for the practical method that any reasonable or sensible man would adopt.

On the two occasions when Mr. Kinsmann says he was talking with Putzar in the yard when the men were coming off, how does he know that Putzar had not already checked up the men previous to their coming off the ship?

According to respondent's own testimony, the keeping of time is done by checking the men off ~~in~~ the

morning, also seeing they were on the job during and between the morning and noon, checking them in the afternoon and seeing them on the job in the afternoon (brief, pages 91-92). That is a day job, but when the men work continuously during the night, it is not necessary to watch them all the time.

The unfairness of respondent in this matter is exemplified by the following quotation from his brief (page 94):

“By this time, the Court is probably wondering what Putzar did, if he didn’t keep time. The record discloses an answer: David Doig, the foreman of the machine shop, says, ‘All day long I had to contend with Mr. Putzar, and he chased me all day long *around the shop*’ (Vol. III, page 1006).”

The inference is suggested from this, that he was not keeping time. Here is the entire statement of the witness. He is asked with reference to the fairness with which he divided up his personal time between the different jobs:

“A. Just as honestly as I possibly could. If the job was a hard job to contend with, I had to put more time in with it, and my time was more taken up with that job; my time went down on that particular job. All day long I had to contend with Mr. Putzar; and he chased me all day long around the shop”.

To an impartial mind, that is testimony indicating Putzar’s fidelity to his employer, and as the keeping of proper time is an element of such fidelity, the inference would be the reverse of the one respondent attempts to



draw. He was keen upon the heels of the foreman of the machine shop, to see that the Matson Company got what was its due.

We have said that Putzar's time book was his independent record. The cards were the United's independent record. But exception is taken to the fact that the two were put together, and checked one against the other, and the result recorded as the time to be charged. And it is further objected that his record was made in duplicate, one copy handed to each party, for what Putzar retained he retained as the representative of his employer. The allegation that he did not turn this over to his employer until two months afterwards, is injected into this controversy to impute a desire to withhold the information from the Matson Company. They worked upon these repairs until the morning of the sailing of the vessel and Putzar had, in addition, the multiplicity of his duties connected with the preparation of the vessel for sea. We know that immediately upon the completion of the work, he went to sea as chief engineer. He was thus not only absent, but he was fully employed in another vocation. Under these conditions, can respondent find no more charitable inference for that delay than an inference of fraud?

Objection is made that the time sheets from September 17th to September 24th, inclusive, are in Mr. Curtis' handwriting, from which the inference is suggested that Curtis domineered Putzar's record of time.

In the first place it is immaterial who did the clerical work of transferring the time to these sheets. Putzar

might have done it, if he had had time. Curtis might have done it, if he had time, or, had neither had time, a clerk might have been employed to do it. The material fact connected with the matter is this: Putzar had his independent record in his time book; Curtis had his independent record in his time cards. The one must be checked against the other, or there can be no agreement as to time. Each was keeping independent time. The fact that Curtis wrote these up at a single sitting is itself evidence that Putzar was not regarding the time sheets as his daily record, but was depending upon his time book. The fact that they were not entered up in consecutive order, at times, is evidence of the same fact. Putzar, having his own time, made his comparison between that and the time cards at his leisure, and, after checking one against the other, and arriving at an agreement as to their correctness, the result was recorded in these sheets. Though at first, the sheets were daily entered up, during this time, the testimony is clear that Mr. Curtis was prodding Mr. Putzar to check up the cards against his own time, and Putzar said he was too busy (Vol. V, pages 1524, 1525). Finally, when he had checked them as correct, he passed them as corrected to Mr. Curtis to do the clerical work of recording the result on the sheets (Vol. V, page 1525), and after they were so recorded he checked that record back against his own record (Vol. V, page 1525). What is there wrong or suspicious about that? How does that impute collusion, or fraud, or infidelity or inaccuracy, to the time kept by Putzar?

But it is said that the result of Putzar's work belonged to his employer and to no one else.

“In this view of the matter, the time book, the time sheets and all else connected with his work was the sole property of the respondent. Yet we find libelant in possession of purported duplicate carbon copies of the original sheets, and these copies are introduced against respondent as proof of the value of the labor done on the ship” (brief, page 98).

This contention is childish! Is a timekeeper a secret agent, a detective, a spy upon the United? Or is he appointed to see to it that the time which they claim, and upon which their bill will be made out when presented, is the correct time?

It will be noted that not only by the method pursued did the United have the advice of the time kept by the Matson Company, but the Matson Company, in turn, had advice of the time kept by the United, in the cards that we give to their timekeeper for inspection. As well say that Mr. Curtis was untrue to his employer, in submitting that time to such inspection; that he, in turn, should have been a secret agent, to build up the time for the United. The two records must, at some time, be compared. Were they to be held to be fought over at some future date? Were they to be held for the purpose of initiating a dispute as to the correctness of the bill? Or were they to be compared and adjusted when the facts were yet fresh in the minds of both parties, and when differences might be adjusted by consulting the work itself and the workmen thereon employed?



The fact that this record was given to both parties would not prevent them from rechecking it, as was proposed by the United when the dispute first arose.

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#### IRREGULARITIES OF PUTZAR'S TIME SHEETS.

We think we have already disposed of respondent's "(c). *Failure of time sheets to chronologically state the time.*" If that is not sufficient we are satisfied with respondent's suggestion as to the reason on page 110 of his brief, because that suggestion casts no doubt upon the verity of the record. "To err is human" and to correct such errors when discovered is as nearly divine as is given to humanity. It is not evidence of "fraudulent collusion."

"(b). *Improper charges for work done on the circulating pump and smoke stack contracts*" (brief, page 101).

Now, it is admitted in the brief that there was a dispute as to how much of the work done upon the smoke stack was covered by the \$900 contract. While we do not feel that the District Court was justified in striking out the \$180 charged on the smoke stack for extra work, it is not our present purpose to discuss the matter from that point of view. The question is whether or no at the time that Putzar kept his time, he was justified in placing the smoke stack charges, referred to in respondent's brief, on a time and material basis rather than under a contract and whether or no

his having done so is evidence of "fraudulent collusion" (brief, page 108).

The items in question are those charged on *sheet 42 under No. 5360* (brief, page 107). By consulting the sheet, we see that this work is denominated "Smoke Stack." It does not refer to the \$180 item which was disallowed, which is for making "new top for breeching and *making 2 new* turnbuckle hangers (Vol. I, page 39, Schedule 9). Note that this charge is for making *two new* turnbuckle hangers.

Neither is it for the \$60 allowed by Klitgard according to the testimony quoted in the brief (pages 106-107), for that was the "air casing around stack below umbrella enlarged and renewed." See Klitgard's report "of minor contracts" (Vol. VI, page 2702, Subd. 9). It was for *other work* upon the smoke stack, *which was not under contract*, and this is shown by libelant's exhibit Klitgard No. 2, which is Klitgard's own report upon the work (Vol. VII, page 2688). Under the heading in that report of the "work performed *but not under contract*," we find (on page 2699, Subd. 6): "Smoke stack guys, shackles, turnbuckles, pins, blocks and nuts *overhauled and repaired*."

Again, under the same head of "work performed but not under contract," as it relates to the boilers, we have in the same report (Subd. No. 7, page 2698) "1-8" Channel iron stanchion supplied and fitted in lower course flange, *after end of stack*, as directed (for extra support)."

Then again on the next page under the same head (Subd. No. 10): "*Damper in main stack, overhauled and reinstalled, new handle supplied and fitted.*"

This is all "smoke stack" work and answers the description in Putzar's sheet of the charges against the "smoke stack."

So that the full force of this admission may not be lost we again call attention to the exhibit. These items are under the head of "*work performed, but not contracted for.*" At the end of that heading, we have another head, page 2700, "main contract," which contains Mr. Klitgard's contention respecting the manner in which the work under the specifications was done. On the following page, 2702, we have the heading "Minor Contracts," which contains Mr. Klitgard's report of the smoke stack *contract* (Subd. 8).

"Stack renewed. \$900.00. *Lower casing omitted.*"

This is an admission that the \$60 charged in Schedule 9 of libel was not intended to be included in the \$900 contract. This is followed by Subd. 9:

"Air casing around stack, below umbrella enlarged and renewed, \$60.00."

The above is conclusive proof that, at the time the work was being done, Klitgard, as well as Putzar, knew that there was "smoke stack work" being done that was *not included under any of the contracts*. Thus Putzar's interpretation of the "smoke stack" contract is corroborated by Klitgard.



If this charge in Putzar's time sheet indicates "fraudulent collusion" then Klitgard was a party to that fraud.

"(a) *Improper charging of the work done on the donkey boiler contract.*"

This charge appears upon the first day's work.

The catching at this is like the catching of a drowning man for straws, and indicates the extremity to which respondent is driven for evidence for "fraudulent collusion." That it was not allowed, but was crossed out of the carbon sheet, is admitted, and if the Court will consult that sheet it will see that it is crossed out in the *peculiar colored pencil* which Putzar used to sign his name upon the back, and with the same pencil that the last item on said page, "air tool, 8 hours," is stricken out. This is sufficient evidence that Putzar and not libelant crossed it out. This is also *prima facie* evidence that he crossed it out *before he signed the sheet upon the back*, namely, at the time he was doing his checking. That the erasure does not also appear upon the respondent's copy may be an oversight. That it is any evidence upon which the Court will be moved to conclude that there is fraud or in anywise to disregard the record we can scarcely conceive.

WORK ON THE WHEEL.—With respect to the wheel, the claim is that the number of hours charged is *impossible*, because the ship went on the dock at 1 o'clock (brief, page 114). This contention is of a piece with the rest. A wheel was furnished which was too large for the ship and required one inch to be

chipped off the end of each of the propeller blades with filing and trimming of the blades. This was not contract work. See Klitgard's Exhibit, Vol. VII, page 2698, subd. 28 at the top.

The respondent, however, nails his foregoing argument to his construction of the language of Williamson and says: "It was done while the wheel was *laying on the barge coming from the other side of the bay*" (page 118). But why not read the testimony right? The witness is asked if anything was done to the wheel before the vessel was put in the dock and he answered, "Yes, sir, while the wheel was laying on the barge coming from the other side of the bay *some fitting was done in the hub.*"

"Q. Why was that done?

A. *Something was the matter with the keyway.*

\* \* \* \* \*

Q. Was any portion of the *wheel cut or chipped off?*

A. *I do not know.*"

This, certainly, is not testimony that it was cut or chipped while "coming from the other side of the bay".

But Klitgard knows. In his Exhibit VII, page 2698, subd. 28, he says, "Chipped one inch off the end of each propeller blade, filing and trimming blades as directed". Does respondent claim that this was done "while the wheel was laying on the barge coming from the other side of the bay"? That was a large piece of work and there is no evidence that it was done anywhere other than at the works.

So, also, with respect to the contention that ten straight hours time on September 10th on the wheel being impossible. That contention is founded upon the assumption that all work on the wheel was done after the vessel was docked, namely, after 1 P. M. It was certainly possible to do this work before the vessel was docked, notwithstanding the ready answer of Mr. Kinsman to the general question

“Q. Could any work have been performed on the wheel of the ‘Hilonian’ prior to the ship going on the dock of the marine railway?

A. No, sir.”

This matter being followed a little further, he is asked about the ten hours straight time.

“Q. What have you got to say about the wheel?

A. That is an impossibility *unless there was a diver working on it.*”

This is conclusive evidence that when Kinsman was testifying about work on the wheel of the “Hilonian” and the impossibility of straight time being performed thereon, he had in mind *not the new wheel* that was to be installed, *but the old wheel* that was then on the vessel. The same remark naturally applies to Mr. Klitgard’s testimony to this point, who, when asked if it would have been possible to have done ten hours straight time on the sea valve or the wheel of the “Hilonian” on September 10th, says:

“A. No, sir, *she did not go on the dock until 1 o’clock in the afternoon*” (brief, pages 114-15).



*The sea valve*:—Upon this subject respondent does not seem to place much reliance. He drops it with a suggestion that Mr. Gray's testimony with respect to an "extension handle" might furnish the inference that it is connected with the sea valve and he then proceeds to pin his faith to the time charged for the wheel on that date. The rest of this matter will be treated under Appendix II post.

*Air tool*:—An allowance for ten hours when but eight and one-half hours were worked (brief, page 126).

Under this head respondent makes a claim that he is charged fifty-five hours for the use of "air tools" when the men only worked 47½ hours, the balance of the 55 hours being the bonus time. In this argument he admits the 55 hours as correct for the men, but questions its correctness as to the tool, because the tool does not receive the bonus time. We make the same answer to this contention as was made to his contention respecting the bonus time allowed to the men. If the Court will consult the Schedule 1 of the libel (record page 31, the third item from the bottom), it will find this charge:

"Air tool and operator    1023    \$1.25    \$1278.75."

In this charge the per hour rate of the *tool* is reduced the same as the per hour rate of the *man*; consequently, to equalize the charge, the air tool time must correspond with the man's time. Had this time not been made to correspond with the man's time the \$1.25 must have been increased correspondingly.

This charge does not appear to be one of the charges by which it is claimed Putzar's time sheets are *discredited*.

Our answer to what follows under this head will be taken up in Appendix II post.

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**ALLOWANCE OF OVERTIME, BEFORE STRAIGHT TIME HAS BEEN WORKED.**

Respondent takes pains to show by the testimony that it is the rule of the shop that a man must work straight time before he is allowed overtime, and then gives a number of instances in which he claims that "the men are shown to have received overtime (on days other than Sundays and holidays) who have not worked *any* straight time." And from these instances he concludes: "If Putzar was keeping an independent record of time, how can it be conceived that allowances of this character were made by him? If he was simply copying, the problem becomes easy of solution" (pages 125-26).

Before entering upon an investigation of the "instances" cited we wish to observe that these instances show not only that respondent has committed error in his statement that they are "instances" of such allowances of overtime, without any straight time, but also show *on the face of the time sheets* that many of the men had worked straight time *on that particular job*; also that the entries of the straight time being under one job number, and the entries of the overtime under another,

had been *separately entered* by Mr. Putzar. This is conclusive proof that he was *not* copying the cards, because *each man's card carried upon its face both his straight and overtime.*

Those instances where the sheet does not show straight time does not prove that the men had not worked straight time, because if a man worked his straight time on another job and overtime on the Hilonian, only the overtime would appear on the sheet. Let us investigate some of the instances.

“Aug. 26    524                    3½ hours.”

This sheet shows on its face that 524 worked 10 hours straight on the engine, and lower on the same sheet he is credited with the 3½ hours overtime referred to.

“395, 396” (same sheet, 2 carpenters) “½ day each.”

These two charges are not overtime charges at all. They will be found on the time sheet only in the total column.

“Aug. 30    100                    1 hour.”

Sheet 16 on the same date shows this man worked 5 hours straight on the “Hilonian”.

Worked on other jobs for the rest of his straight time.

“Sept. 13    537                    3 hours.”

Shows 3 hours overtime.

The same sheet below shows 10 hours straight time on another number, 5398, and overtime on 5325.

“564                    15 hours.”



Shows on the same sheet 10 hours straight time on high pressure valve 5398. The 15 hours overtime was on the propeller.

“Sept. 14 124” (2 sheets) sheet 59, “14 hours overtime.”

On bottom of sheet 60, 10 hours straight time on gear case.

“506 13 hours.”

10 hours straight,

2 hours overtime,

13 hours overtime.

He worked on the first one on the shaft, and the second on the rudder.

“513 (sheet 60) 2 hours.”

He worked 10 hours straight on valves (sheet 59)

2 hours overtime on the engine.

“356 2 hours. (sheet 59.)

10 hours straight on the engine and

2 hours overtime on valves.

“Sept. 15 330 15 hours.” (page 59.)

10 hours straight on wheel,

15 hours overtime on rudder (center of page).

“333 4 hours.”

10 hours straight and

2 hours overtime on links (sheet 65),

4 hours overtime on eccentrics (sheet 64).

"Sept. 16    535            2 hours."  
               10 hours straight time on bilge sections  
                                   (sheet 68),  
               2 hours overtime on coupling bolts  
                                   (sheets 67-8).  
 "355            2 hours."  
               5 hours straight on rudder  
               2 hours overtime on shaft (same page,  
                                   sheet 67).  
 "500            5 hours."  
               10 hours straight (bottom of page 67),  
               5 hours overtime on shaft (middle of  
                                   page 67).  
 "512 (sheet 68) 2 hours."  
 Bottom of sheet 67,  
               5 hours straight on rudder,  
               2 hours overtime on machinery.  
 "519            2 hours."            (page 68.)  
 Sheet 67 (bottom),  
               10 hours rudder straight  
               2 hours overtime.  
 "538            2 hours."  
               5 hours straight time on shaft (sheet  
                                   67),  
               2 hours overtime on machinery (sheet  
                                   68).  
 "Sept. 22    325            10 hours night."            (sheet 85.)  
               "568            8 hours night."

From this it appears that if we were to apply  
 to appellant's "instances" the same reasoning

that appellant applies to the time cards and time sheets, namely, that they disclose so many errors as to discredit them, we would be justified in saying that the foregoing showing so discredits his entire brief upon the subject, as to make it absolutely worthless.

As matter of fact when we have finished, we think it will appear that we have shown so many unfounded criticisms and wrong statements in the brief respecting this keeping of time that the Court will find that no confidence can be reposed in his statement of alleged mistakes.

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**THE CLAIM THAT MATERIAL CARDS DISCLOSE MATERIAL  
USED ON CONTRACT JOBS AS CHARGED TO QUANTUM  
MERUIT (Brief, pages 66-67).**

The instances given here are charges for gratings, ladders and platforms. They are claimed to be contract work, because Schedule 5 of the libel has a charge for repair to ladders, floor plates and gratings in engine room as per agreement.

This is the same objection as is made on page 127 of the brief to a charge in Schedule 1 for 1145 lbs. of checkered floor plate, and is fully answered on the first page of that part of Appendix II which is headed "Reply to Appellant's Brief (brief, 127 to 132)." The rest of the matter under this head will be found treated in said Appendix.

With respect to the conclusion attempted to be drawn that the "whole method and plan was wrong and it is



hopeless to bring order out of the chaos of such proof" we have only to observe that the entire endeavor of appellant is to create a "chaos" by charging as errors what are not in fact errors, and by withholding, as already suggested, many of its claims of error so that the same might not appear in the record as fully explained, when, otherwise, proper explanation could have been obtained at the hearing.

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We think we have answered the various objections raised to the accuracy of the cards and time sheets sufficiently to show that, as a rule, the criticisms are erroneous and far fetched, and made for psychological, rather than any practical, purposes; that they are as accurate as ordinary human agencies can make them. Moreover, we have no apprehension that anyone, having in mind the facts and circumstances as a whole, will for a moment lend ear to the claims made of fraud or collusion on the part of the United or Putzar.

We have one word to say in conclusion concerning these cards and time sheets as evidence:

Appellant assumes that their admissibility is limited to the office of "Memory Assistant", and that therefore Adamson, or any other witness for that matter, could make use of them only in so far as they enabled him to speak of his own personal knowledge of the matters which they recorded (brief, page 21).

He therefore criticises the fact that other cards were introduced where the workmen were dead or had gone

out of the jurisdiction, the verity of which was attested by witnesses to the fact that the workmen were there at the time, and that the handwriting on the card was the handwriting of such workmen. While in every instance, where we could, we offered the testimony, either of the man who made the entry or of some one who could testify to the facts from his own knowledge, nevertheless, we claim that a broader rule of evidence applies to them. It is undisputed that these cards are the accounting system of the United, and that from them the record of time and material is transferred directly to the schedules as they appear attached to the libel, and which are also presented to the customer in the form of a bill (Curtis, V. IV, pages 1428-1429).

In the case of the time sheets, they were, as we have so often had occasion to suggest, checked against Putzar's time book and then *recorded in a permanent form in the time sheets*. By this means, the cards themselves and the time sheets, are admissible not only because we have proved in the one case their verity by a party who knew the facts, and in the other case by proving the signature of Putzar to the sheets, supplemented by the testimony of Mr. Curtis as to the correctness of the sheets, but also upon the principle that they are in effect the account books of the libelant,—*regular entries in the due course of business*.

We took that position at the time the testimony was offered (II 412) and it is supported by a very recent decision of the Circuit Court of Appeals for the Seventh

Circuit, upon which point the opinion cites nearly a half a page of authorities. It is as follows:

WISCONSIN STEEL CO., v. MARYLAND STEEL CO., 203  
Fed. 406, 407.

“Plaintiff had a large shop, employing over 4,500 workmen at the time in question. In order to know how much was paid in wages in the execution of every job, whether for itself or others, plaintiff employed a cost system at the bottom of which were workmen’s time cards. On registering in, a clerk saw to it that each workman got his own card; on registering out that each deposited his card in a locked box. If a workman failed to deposit his card, his time, which should have been accounted for on the card, would not appear in the payroll. These cards were before the workmen at their respective places, and it was their duty, and their practice in pursuance of that duty, to note in writing on their cards the amount of time given to each separate piece of work. From these cards, book-keepers prepared the payrolls, and also sheets which distributed to each job each workman’s time upon that job, not in terms of time as reported on the card, but in terms of dollars and cents on the basis of wages paid. Then upon plaintiff’s account books these items were charged against each job and against the parties who were having the job work done.

‘Regular entries in due course of business are admitted as exceptions to the hearsay rule. Wigmore on Ev. c. 51. To bring entries within the exception, there must appear, according to the general law of evidence, a practical necessity for their introduction and a circumstantial guaranty that the transactions actually took place as recorded. The practical necessity is apparent in large mercantile and manufacturing businesses, where a transaction that has been participated in by numerous employees in the course of their employment is duly



recorded as an original entry in permanent form by one who is charged with that duty in pursuance of an established system. Wigmore, S 1730. *Feuchtwanger v. Manitowoc Malting Co.*, 187 Fed. 713, 109 C. C. A. 461;'

Plaintiff's books, in which original entries (based on the cards) in permanent form were made in pursuance of a duty, were properly admitted in accordance with the foregoing rule. The 4,500 workmen could not keep plaintiff's books of account. The limit of practicability was for them, under an orderly system, to furnish the data in the aggregate from which bookkeepers regularly employed for that purpose could make up the separate accounts.

Workmen's time cards and other parts of the system (apart from the books) were properly admitted, in our judgment, if for no other reason, because they tended to furnish the 'circumstantial guaranty' of the correctness of the book entries."

In *MISSISSIPPI RIVER LOGGING Co. v. ROBSON*, 69 Fed. 781 (C. C. A.), the question is again treated in an opinion that considers not alone the admissibility of such evidence as the time cards and Putzar's sheets, but also holds that, under the circumstances, they are better evidence than the memory of the workmen themselves. We consider it as setting at rest all of the controversies initiated by appellant upon this subject.

There only remains for us to consider:

#### **THE APPELLANT'S "PROOF OF VALUE OF ALL REPAIRS"**

This is based upon the testimony of the alleged experts, and after what has gone before, it does not require a very extended discussion.

Appellant has constantly suggested that in lieu of the proof that we have made, we should have hired experts to examine the work and to testify what, in their opinion, was its reasonable value. In other words, he wished us to enter upon a guessing contest.

We have in fact done better than that, for in addition to the testimony already referred to we have Mr. Curtis' and Mr. Gray's testimony that in their opinion the amount charged in the bill was a reasonable charge for the work performed (pages 1472, IV; 2466, VII).

Mr. Curtis had, in this respect, the advantage over all of appellant's witnesses, for, while Klitgard saw the work as it was performed, he was, after all, only a practical engineer, and his business did not give him the benefit of much experience upon the commercial side of the question. His ability was a mechanical ability, though he has testified to having "kept time on other jobs", and in a few minor cases figured on cost.

Neither Mr. Gardner nor Mr. Heynemann had any knowledge of what the work was that was performed. All of their knowledge upon this subject was derived from what they could see of the *completed* work, and what they *could not* see *was explained* to them by Mr. Kinsman.

Now what they could see was only the finished work. They had no knowledge of the conditions and difficulties under which it was performed. What was explained to them by Kinsman is hearsay purely; nor do we know what Kinsman said to them in such "explanation".

That is important, because, were we to waive its hearsay feature, his explanation may have been entirely wrong and misleading, for Kinsman himself had no accurate knowledge of the job, regardless of what appellant claims. He was an assistant engineer, not engaged upon this work at all, but, as we have already said, occupied in the boiler room repairing the auxiliaries. His explanations, however, were only his unsworn oral statements.

On the other hand, Mr. Curtis' duties have for years been the following up of work of this nature, checking the time and material and preparing the bills therefor, and Mr. Gray's experience is both mechanical and commercial. By this means each obtains an experience that would give him an accurate knowledge of the cost, and to that extent his opinion is more valuable than that of any witness called for the appellant.

But this is not our only objection to the testimony of appellant's experts:

Their figures and their testimony show that their conclusions were not based upon true data. As already suggested, the specifications on which they based their figures were materially different from the specifications upon which the bid was made, in that it included what was called an "assembling clause", upon which we have already commented.

In the next place they proceeded upon the theory that the changes and modifications in the specifications were substitutes, and, instead of figuring their value, they



adopted the specifications as though they were unchanged, and applied to the changed work the specification price. As we have already indicated, that was a price fixed for work "in strict accordance with the specifications".

In the next place, they were unable to reproduce any of their calculations resulting in the different amounts appearing in the tabulation of their report, "Exhibit 1, Heynemann, No. 4", pages 2667 and 2670. This was very important. For instance, take the first item: "1—\$800." This refers to item No. 1 of "Respondent's Exhibit Kinsman No. 2" (page 2643), "Renewed No. 4 tank top on port side and secured fore and aft and thwart ship angle irons under same."

The experts could not give a single element of the calculation on which they base the gross allowance of \$800 and so with each of the other items that were taken up. When pressed for this they "fenced", they skirmished and finally absolutely refused to reproduce the calculation.

This was made the subject of an appeal to the Court to compel them to answer (Vol. VI, page 2126), and the Court, having ordered them to answer, we were still unable to procure the detail. That they never had any detail is morally certain, and that is the reason they could neither produce the original nor refigure it, at our request. What they did was to make a guess, or, as Mr. Hough denominates it, "an educated guess", if you please, and, after they had both made their guess, they

came together and compromised their differences so as to agree upon a given sum (page 265).

In this regard we refer especially to the testimony of Mr. Heynemann, the first of those experts to be examined, and ask of the Court a careful reading of that record.

Appellant in his brief challenges us to criticise Mr. Gardner, but his testimony requires no criticism further than the reading of his examination.

But if appellant thinks that, because Mr. Gray said that he is a skillful man, that he is thereby endorsed as one able to make an accurate estimate of such work, he is mistaken. We accept appellant's challenge to speak outside of the record to the extent of saying that since Mr. Gardner's testimony was given in this case we are informed that he has admitted that we "got him" on his cross-examination. More than this, we are also informed that his attempt to testify as he did in this case has made him the subject of ridicule by others engaged in the same line of business.

However, what shall we say of the experts, whether they be Heynemann or Gardner, who would lend themselves to the rewriting of a report upon their work such as that to which we have called attention in the earlier part of this brief.

Again, we have the testimony of three witnesses, any one of whom is at least as expert as Mr. Gardner and Mr. Heynemann, and one of whom has an international reputation, namely, Mr. Dickie, and every one of these

witnesses agree that an estimate made in the manner in which these alleged experts made their estimates is absolutely of no value.

When asked as to the rule of conduct of men who are careful of their reputations as estimators with respect to estimating upon repair work, Mr. Dickie, after saying he would not like to answer that question in the way we suggested, says:

“Well, I would not like to answer that question in that way, because, what may be a rule of conduct for one would not be a rule of conduct perhaps for another. Some men would undertake an estimate that another would hesitate to undertake. Fools rush in, where angels fear to tread (page 2567).

Q. Fools rush in, where angels fear to tread, and angels fear to tread in estimates on repair work. Is that what we are to understand?

A. No. That might be inferred, but it refers to all estimators, and it refers to repair work particularly, because repair work is not as a rule estimating but to a large extent a guess” (pages 2567-68).

This same witness explains, in detail, why repair work is not “a fit subject for estimating on, either before or after the work was done; probably it would be more difficult to make an estimate after the work was done, because the condition before the work was undertaken would not then be apparent, and the amount of preparation and the amount of work connected with the dismembering of the parts that had to be renewed would be unknown, and there would be no evidence to show what it consisted of, or what the difficulties were that had to be encountered” (Vol. VII, page 2563).



Again, he says: "I have known jobs to cost twice what they have been estimated to cost, without any apparent reason why, and I have known jobs to cost less. The uncertainty of estimating is such that no one can really be sure about an estimate of repairs. I think that is the experience of all those who are engaged in the business" (pages 2564-65).

With respect to the "pointing out and describing" which Mr. Kinsman is supposed to have done for these experts, the same witness says:

"Well, that, of course, would make a difference, if the work was pointed out and described. Of course, no one can say anything about that at all, *because it would depend upon the description and how the pointing out was done*" (Vol. VII, pages 2570-71).

As already suggested, we know nothing about the description, and how the pointing out was done, by Kinsman.

To a long question by the appellant, in which he sets forth the conditions and manner in which he claims Mr. Gardner and Mr. Heynemann did their work (pages 2573-74), he concludes with the following:

"I will ask you if, under those circumstances, it is still your opinion that that estimate arrived at by those two engineers under those circumstances, would be less accurate than would be your estimate, or that of any other competent engineer bidding on the work before it was done",

to which the witness replies:

"Yes. I think it would be so. I most certainly would not have adopted that method of trying to

correct a dispute of this character. It seems to me that these engineers should have also consulted with the people who did the work, and gone carefully over their time and material *and checked up any errors*, if they found them, which would appear to me to be the reasonable way to check up work after it is done."

We suggest that the entire testimony of this witness be read, as he is a man of more than ordinary intelligence and experience, and his testimony is to the point.

Mr. Hopps, when asked about an estimate of the cost of work after it has been performed, by an inspection and by having part of it that he could not see, described to him, says:

"I should not put much confidence in an estimate made under those conditions."

When asked why, he says:

"The cost of repair work generally is very largely labor. Under any circumstances it is a very difficult matter to estimate the amount of labor that will go in any piece of work. It is impossible to know how much work any workman will do in a given time. The conditions under which the work is done affect the amount that goes into it. *Unless you know exactly the conditions under which the work is done*, and have experience—have exact information not experience—as to the cost of similar work done under exactly the same conditions, it is not possible to estimate the amount of time it will take with any degree of accuracy."

Among his conditions, under which the work is done, he names one which we consider very important in this case, namely:

“Work carried on in places where it is necessary to work in a very confined space, is necessarily very much more expensive than in places where ample room is available. If a man has to work in an awkward position, the work is very much more fatiguing than if he can work in a natural position, and the amount of time required, consequently greater” (Vol. VII, pages 2547-49).

It is not necessary to quote further.

Circumstances attending the calling of Mr. Hough makes his testimony upon the subject of peculiar value. This is the man to whom the respondent went for an estimate, and he refused to give it, and who “suggested to Mr. Diericx that I considered it impossible to determine accurate valuations upon repair work which I had never seen”, and received “a retainer” not to give any information upon the subject to the United. He testifies to the same effect as the above gentleman (Vol. IV, page 1370).

Returning to Mr. Klitgard’s estimate, we have already suggested one reason why he would not be very capable in that direction. He had also the personal disability of being erratic. “He will tell you one thing to-day and something else to-morrow” (page 2460).

Moreover, his estimate, which amounted to \$23,156, did not figure into that amount any overtime. Gardner and Heynemann allowed \$2,000 for overtime on work *outside of specification work*, and their \$2,000 was a random guess, though they claimed they tried to make it large.



As the specification work was the most trying, and the principal part of it having been done in the hold of the vessel, it would result in more overtime than the work on the tank tops, windlass, etc. *Mr. Dwyer did not seem to be satisfied that Garmon's allowance for overtime was sufficient (I-105)*

Under these circumstances, if we might be permitted to add to their guess of \$2,000 another guess for overtime upon this other work, we do not think that we would be overstating the matter, by fixing it at \$10,000. That was Gray's "educated guess" (page     ). This being added to Mr. Klitgard's estimate would be \$33,156. Add to this the fact that the prices used by respondent's experts were the prices appearing upon the face of the bill or schedule which prices are *admittedly not the prevailing prices for actual time*, as we have repeatedly hereinbefore shown, it would seem that our bill for \$34,000 is not out of the way even upon the basis of Klitgard's estimates with due allowance made for errors in his "guess".

Upon the whole, we think that the work of respondent's experts cannot be considered as of sufficient value to form the basis of compensation to the United in this case.

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#### COSTS.

This subject does not require very extended consideration.

It is admitted that the allowance of the costs lies in the discretion of the Court. That being so, and the lower Court having allowed the costs, this Court will not interfere unless, of course, there be a plain abuse of

that discretion. This, it seems, ought to end the discussion.

But it is said that the United was guilty of such misconduct in the trial of its case as to make the act of the District Court in allowing costs an abuse of discretion.

These charges are as follows:

The record is large. A large number of witnesses were called. A large number of exhibits were introduced.

Let us consider this charge. It is said libelant's case, direct and rebuttal, covers 1808 pages of the printed record, and took thirty-five days to present. Of that 1808 pages appellant makes no note of the number of pages of the *cross-examination*, but charges it all to the libelant. Nevertheless the cross-examination was not only exceedingly voluminous, but it was also very often a mere fishing expedition, and full of immaterial and improper inquiries, which the libelant could not prevent when the record was being made before a commissioner.

The number of witnesses that have been called, and in fact the entire method pursued in proving the case, was forced upon the libelant by the "tactics" of the respondent, as already indicated in this brief, and yet he wishes to punish us for doing that which he himself compelled us to do.

Neither is anything said concerning the number of pages of the record that is filled with the "encounters"

of counsel, and which *at the demand of the appellant*, were all put into the record (page        ).

The fact that the cards were introduced in evidence “without any segregation of the material portions which could have been read into the record”, has in no wise increased the record, because nothing but the date, and the name of the man, was read into the record.

Most notable of all is his suggestion that Adamson’s testimony as to 15 of the workmen is duplicated by calling the workmen themselves, when this was only rendered necessary because of doubt cast upon Adamson’s testimony with respect to the work of those fifteen men by the cross-examiner.

Then, it is said, that we cause delays in bringing the case to a close. Nothing, however, is said about the delays that were caused by the appellant, particularly the long adjournment that was rendered necessary to enable him to proceed with the trial in another case, and also to await the return of his witness, who was absent. In his brief he says:

“Respondent finished the direct examination of his last witness on November 18th, and no further proceedings were had until May 1st when the libelant cross-examined this witness and started its rebuttal”.

While the pages of the record, which show this long continuance, are cited in the brief, nothing is said in the brief as to its cause. Respondent had closed its direct examination of one of its experts and desired us to cross-examine him that afternoon without preparation



for that purpose. Of course we could have gone on and filled the record with random inquiries at that time, which we did not desire to do. It was *Saturday afternoon, November 18th* (page 2252). We proposed to take the matter up the following Monday, but counsel for respondent said he could not go on then, that he had an engagement at Redwood City in the Moore divorce case. Libelant then suggested Tuesday, which was declined, and Wednesday which was declined. The discussion closed with the request on the part of the libelant that the respondent let us know at least a day ahead when he would be ready to take the matter up again (page 2285). In the interim between that time and May 1st, his time was taken up with the trial of the case referred to and after it ended, his witness was abroad and could not be had for examination. It was up to him to produce him. Inferentially, as far as the brief discloses, we were chargeable with that delay, which was not ours, but his.

So far as his objections to the manner of our proof is concerned, we think that is settled by the cases to which we have already referred.

We hardly think that this Court will conclude that the District Court abused its discretion, under the circumstances.

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#### WITNESS FEES AND MILEAGE OF WITNESSES.

Appellant says that the practice in the District Courts of California has been against the taxation of such

costs. The District Courts of California are not the only District Courts in this Circuit and Judge De Haven's ruling in the present case would indicate a conviction upon his part that the rule which is said to have prevailed in the California Courts should be changed, for in this instance he has taken the opposite view. Judge Hawley, sitting in Nevada Circuit Court, has given the matter a very careful consideration, in the case of *HANCHETT v. HUMPHREY*, 93 Fed. 895 to 898, in which he says:

“Upon a careful review of all the decisions in the national courts, it is manifest that the great weight of authority and of reason is opposed to the conclusion heretofore followed in this Circuit.”

He then reviews all the cases upon the subject and concludes:

“Is it not, therefore, better to follow a well recognized and sound principle of law than to blindly adhere to a precedent simply because it was made in your own Circuit?”

We are content to submit that question upon that opinion.

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#### INTEREST.

The District Court did not allow libellant interest on its *quantum meruit* claim for the period of time preceding the rendering of a judgment and we think in this respect the judgment of the lower Court should be amended. We recognize that the allowance of interest like with the allowance of costs rests in the discretion

of the Court, but in this instance, the disallowance of interest was not an act of discretion, but it was disallowed because the lower Court conceived it to be the law of the State that upon a *quantum meruit* claim interest cannot be recovered *as a matter of law*. He *did* allow interest on the contract counts. He thus exercised his *discretion* in favor of allowing interest.

Our criticism of this part of the decision of the District Court lies in the application of the rule to the facts of this case. It is expressly said, in the case from which the District Court quotes at length that:

“The *reason* for such denial of interest is said to be that the person liable does not know what sum he owes, and therefore can be in no default for not paying. The damages in such case are an uncertain quantity depending upon no fixed standard, and are referred to the wise discretion of a jury and can never be made certain except by accord or verdict” (page 2599).

Now that *reason* does not apply to the present case to the full amount of the *quantum meruit* claim, for by its answer *the appellant admits that there is due on the quantum meruit claim the sum of at least \$19,568.32* (page 48). To that amount therefore the reason of the rule does not apply, and interest should have been allowed thereon for the same time that it was allowed on the other count, viz.: November 28th, 1909, to the date of the judgment, November 26th, 1912.

This brief might have been made more compact, but we had misjudged the time it would take for the examination of the enormous amount of detail that appel-



lant's objections rendered necessary, and so find ourselves pressed for time. We hope, however, that our work will be an aid to the Court in arriving at a just conclusion.

Respectfully submitted,

NATHAN H. FRANK,

IRVING H. FRANK,

*Proctors for Appellee.*



## APPENDIX I.

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### Details of Time and Material Cards, SHOWING SEGREGATION OF LABOR AND HOURS WORKED AND MATERIAL USED, TOGETHER WITH RESUME OF PUTZAR'S TIME SHEETS.

In order that the court may understand the exhibits we offer the following explanation: Each man in the ship has an identifying number; this is called his ship number and appears at the top of the left-hand corner of the time cards.

There are also numbers upon each card indicating the man's occupation. By this number the classification of labor is determined, to-wit: Whether the man be a machinist, a helper, a riveter, a machine operator, a blacksmith, a pattern-maker, a boiler-maker, etc., as shown on the schedule which we have prepared segregating the labor and the number of hours worked.

On the left-hand column under the heading "job number" are a series of numbers which indicate the particular job upon which the men worked during the number of hours on the same line in the succeeding column. By job is *not* meant the entire work on a particular vessel. The same work may be, as in fact in this case it was, divided up into a large number of jobs, each carrying its own number. These numbers follow that particular job throughout whether it be handled in the ship or in the shop.

The column "piece number" is only used where the men are working on piece work and has no application to the work done in the repair of the "Hilonia".

The clock cards simply register the entrance of the men in the works in the morning and their exit out of the works at night.



5295	5318	5394	5398
5296	5346	5325	
5297	5360		

[illegible]

[illegible]

[illegible]



[illegible]

Sheet No. 5

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman
Brought forward				681 $\frac{1}{4}$	315 $\frac{1}{2}$	127 $\frac{1}{4}$										
Adamson	20	G. Martiole	8/26	344				4 $\frac{1}{2}$								
"	20	"	8/27	"				2 $\frac{1}{4}$								
"	20	"	8/28	"				4 $\frac{1}{2}$								
"	21	"	9/12	"				25	Sunday							
"	21	"	9/16	"				3								
"	21	"	"	"				5 $\frac{1}{4}$								
"	21	"	9/13	"				2								
"	21	"	9/5	"				5 $\frac{1}{4}$								
"	21	"	9/18	"				6								
"	21	"	9/19	"				8	Sunday							
"	21	"	9/19	"				6	"							
"	21	"	9/19	"				5	"							
"	21	"	9/20	"				1 $\frac{1}{2}$								
"	21	"	9/21	"				2								
"	21	"	9/22	"				6								
"	22	"	9/14	"				7 $\frac{3}{4}$								
"	22	"	9/10	"				12 $\frac{1}{4}$								
"	22	"	9/9	"				20	Holiday							
"	22	"	9/8	"				9 $\frac{3}{4}$								
"	22	"	9/6	"				25	Holiday							
"	22	"	9/5	"				25	"							
"	22	"	9/4	"				14 $\frac{1}{4}$								
"	22	"	9/3	"				9 $\frac{3}{4}$								
"	22	"	9/2	"				15 $\frac{3}{4}$								
"	22	"	8/31	"				26 $\frac{1}{2}$								
"	22	"	8/30	"				6								
"	22	"	9/11	"				14 $\frac{1}{4}$								
Carried forward					681 $\frac{1}{4}$	315 $\frac{1}{2}$	127 $\frac{1}{4}$	272 $\frac{1}{4}$								

et No. 6

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman
Brought forward				681 $\frac{1}{4}$	315 $\frac{1}{2}$	127 $\frac{1}{4}$	272 $\frac{1}{4}$									
amson 22	Wm. Hay	9/20	343				1									
" 23	"	9/16	"												2	
" 23	"	9/14	"				1									
" 23	"	9/13	"												2	
" 23	"	9/21	"				2									
" 24	"	8/30	"				4									
" 24	"	8/30	"				$\frac{3}{4}$									
" 24	"	8/29	"				18	Sunday								
" 24	"	8/31	"				2									
" 24	"	"	"				4 $\frac{3}{4}$									
" 24	"	"	"				3									
" 24	"	"	"				2 $\frac{1}{4}$									
" 24	"	9/1	"				5									
" 24	"	9/1	"				3 $\frac{3}{4}$									
" 24	"	9/2	"				3 $\frac{1}{2}$									
" 24	"	9/2	"				2 $\frac{1}{2}$									
" 24	"	9/2	"				2 $\frac{1}{4}$									
" 24	"	9/2	"				....									
" 24	"	9/3	"												4	
" 24	"	9/3	"												2	
" 24	"	9/3	"												1)	
" 24	"	9/3	"												2)	
" 24	"	9/3	"				1 $\frac{1}{2}$									
" 24	"	9/4	"												3	
" 24	"	9/4	"												2 $\frac{1}{2}$	
" 24	"	9/4	"				1 $\frac{1}{2}$									
" 24	"	9/4	"												$\frac{3}{4}$	
" 24	"	9/5	"					Sunday							3 $\frac{1}{2}$	
" 24	"	9/5	"					Holiday							3 $\frac{1}{2}$	
" 24	"	9/6	"				12								10	
Brought forward				681 $\frac{1}{4}$	315 $\frac{1}{2}$	127 $\frac{1}{4}$	343									36 $\frac{1}{4}$



Sheet No. 7

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Dressman
Brought forward				681 $\frac{1}{4}$	315 $\frac{1}{2}$	127 $\frac{1}{4}$	343									361 $\frac{1}{4}$
Adamson	24 Wm. Hay	9/7	343													4
"	24 "	9/7	"													2 $\frac{1}{4}$
"	24 "	9/8	"													3
"	24 "	9/9	"						Holiday							10
"	24 "	9/9	"						"							4
"	24 "	"	"						"							1
"	24 "	9/10	"													3
"	25 "	8/27	"				1									
"	25 "	8/27	"				2 $\frac{1}{4}$									
"	25 "	8/26	"				1									
"	25 "	8/26	"				4 $\frac{1}{2}$									
"	25 "	8/25	"				1									
"	25 "	8/28	"				4									
"	26 J. McDonald	8/26	342				4 $\frac{1}{2}$									
"	26 "	8/27	"				3									
"	26 "	8/28	"				5									
"	26 "	8/30	"				9									
"	26 "	8/31	"				2									
"	26 "	8/31	"				1									
"	26 "	8/31	"				$\frac{1}{2}$									
"	26 "	8/31	"				1									
"	26 "	9/1	"				2									
"	26 "	9/1	"				3									
"	26 "	9/1	"				2									
"	26 "	9/1	"				2									
"	26 "	9/2	"				3									
"	26 "	9/2	"				2									
"	26 "	9/2	"				2									
"	26 "	9/2	"				3									
Carried forward				681 $\frac{1}{4}$	315 $\frac{1}{2}$	127 $\frac{1}{4}$	401 $\frac{1}{2}$									681 $\frac{1}{4}$

Sheet No. 8

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman
Brought forward				681 $\frac{1}{4}$	315 $\frac{1}{2}$	127 $\frac{1}{4}$	401 $\frac{1}{2}$									63 $\frac{1}{2}$
Amson 26	J. McDonald	9/3	342				3									
" 26	"	9/3	"				2									
" 26	"	9/3	"				2									
" 26	"	9/3	"				1									
" 26	"	9/4	"				9									
" 26	"	9/7	"				3									
" 26	"	9/8	"				3									
" 26	"	9/9	"				4	Holiday								
" 26	"	9/9	"				6	"								
" 26	"	9/9	"				2	"								
" 26	"	9/11	"				2									
" 27	"	9/12	"				2)	Sunday								
" 27	"	9/12	"				2)									
" 27	"	9/12	"				2)	"								
" 27	"	9/12	"				4	"								
" 27	"	9/12	"				4	"								
" 27	"	9/13	"				2									
" 27	"	9/18	"				4									
" 27	"	9/20	"				2									
" 27	"	9/20	"				1									
" 28	J. Kaszner	8/31	341			3										
" 28	"	8/31	"		$\frac{1}{4}$ )											
" 28	"	8/31	"		6 $\frac{1}{2}$ )											
" 28	"	8/31	"		2											
" 28	"	8/31	"			6 $\frac{1}{2}$										
" 28	"	9/2	"			5 $\frac{3}{4}$										
" 28	"	9/5	"			23		Sunday								
" 28	"	9/6	"			24		Holiday								
" 28	"	9/7	"			6										
" 28	"	9/9	"			23		Holiday								
" 28	"	9/11	"			12 $\frac{3}{4}$										
Carried forward				681 $\frac{1}{4}$	324 $\frac{1}{4}$	231 $\frac{1}{4}$	463 $\frac{1}{2}$									63 $\frac{1}{2}$

Sheet No. 9

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by											
				Machinis	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator Draftman
Brought forward				681 $\frac{1}{4}$	324 $\frac{1}{4}$	231 $\frac{1}{4}$	463 $\frac{1}{2}$								631
Adamson	29 J. Kaszner	9/12	341		23			Sunday							
"	29 "	9/13	"	8 $\frac{1}{2}$											
"	29 "	9/14	"	7 $\frac{1}{2}$											
"	29 "	9/15	"			7 $\frac{1}{2}$									
"	29 "	9/17	"			7									
"	29 "	9/19	"		23			Sunday							
"	29 "	9/21	"	4	1										
"	29 "	9/21	"		1										
"	30 Wm. Megow	9/10	340	9											
"	30 "	9/8	"	5											
"	30 "	9/4	"	9											
"	30 "	9/3	"	9 $\frac{3}{4}$											
"	30 "	9/11	"	1											
"	31 "	9/18	"	5											
"	31 "	9/16	"	9 $\frac{3}{4}$											
"	32 C.E. Wilson	9/12	339			18		Sunday							
"	33 "	9/6	"		9			Holiday							
"	33 "	9/1	"		1	2 $\frac{1}{2}$									
"	33 "	9/9	"			18		Holiday							
"	34 J. Wojdacki	9/8	329	4											
"	34 "	9/7	"	5											
"	34 "	9/6	"	20 $\frac{1}{2}$				Holiday							
"	34 "	9/5	"	18				Sunday							
"	34 "	9/3	"	7											
"	34 "	9/2	"	7											
"	34 "	9/2	"	1											
"	34 "	9/2	"	4											
"	34 "	9/1	"	13 $\frac{3}{4}$											
"	34 "	8/31	"	17 $\frac{1}{4}$											
Carried Forward				847 $\frac{1}{4}$	382 $\frac{1}{4}$	284 $\frac{1}{4}$	463 $\frac{1}{2}$								631



Sheet No. 10

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman
Brought forward				847 $\frac{1}{4}$	382 $\frac{1}{2}$	284 $\frac{1}{2}$	463 $\frac{1}{2}$									63 $\frac{1}{2}$
Amson 34	J. Wojdacki	8/30	329	7												
" 35	T.M.Fleming	9/11	331	4												
" 35	"	9/11	"	4												
" 35	"	9/10	"	9												
" 35	"	9/8	"	7												
" 36	"	9/16	"	9 $\frac{3}{4}$												
" 36	"	9/17	"	3												
" 36	"	9/15	"		9											
" 36	"	9/13	"	4												
" 36	"	9/13	"	3												
" 36	"	9/13	"	9												
" 37	RudolphShafer	9/10	332	1 $\frac{1}{2}$												
" 37	"	9/6	"	20												
" 37	"	9/5	"	18												
" 37	"	8/30	"	.....												
" 37	"	9/1	"	6												
" 38	C.A.Peaslee	9/8	334	9												
" 38	"	9/10	"	4 $\frac{1}{2}$												
" 38	"	9/7	"	9												
" 39	JoeLarraondo	9/12	335		18											
" 39	"	9/13	"		4 $\frac{1}{2}$											
" 39	"	9/17	"		1											
" 39	"	9/15	"		2 $\frac{1}{2}$											
" 39	"	9/16	"		2											
" 39	"	9/16	"		3 $\frac{1}{2}$											
" 39	"	9/16	"		1											
" 39	"	9/17	"		1 $\frac{1}{2}$											
" 39	"	9/17	"		1 $\frac{1}{2}$											
" 39	"	9/20	"		1											
Carried forward				975	427 $\frac{3}{4}$	284 $\frac{1}{4}$	463 $\frac{1}{2}$									63 $\frac{1}{2}$

Sheet No. 11

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman
Brought forward				975	427 $\frac{3}{4}$	284 $\frac{1}{4}$	463 $\frac{1}{2}$									63 $\frac{1}{2}$
Adamson	39 J. Larraondo		335		1											
"	39 "	9/20	"		1											
"	39 "	9/21	"		1											
"	39 "	9/21	"		$\frac{1}{2}$											
"	40 "	9/10	"		1											
"	40 "	9/10	"		$\frac{1}{2}$											
"	40 "	9/10	"		2											
"	40 "	9/10	"		3											
"	40 "	9/7	"		2											
"	40 "	9/4	"		$\frac{1}{2}$											
"	40 "	9/3	"		5 $\frac{1}{2}$											
"	40 "	9/3	"		1											
"	40 "	9/3	"		$\frac{1}{2}$											
"	40 "	9/2	"		2											
"	40 "	9/2	"		1											
"	40 "	9/2	"		1											
"	40 "	9/1	"		1 $\frac{1}{2}$											
"	40 "	8/31	"		1											
"	40 "	9/11	"		1											
"	40 "	9/11	"		1 $\frac{1}{2}$											
"	41 A.B. Watson	9/15	336	31 $\frac{1}{2}$												
"	42 "	9/8	"	3												
"	43 C. Chaquette	9/10	338		2											
"	43 "	9/4	"			9										
"	43 "	9/3	"			9										
"	43 "	9/2	"			5 $\frac{1}{2}$										
"	43 "	9/1	"	2												
"	43 "	8/31	"			9										
"	43 "	8/30	"			4										
Carried forward				1011 $\frac{1}{2}$	458 $\frac{1}{4}$	320 $\frac{3}{4}$	463 $\frac{1}{2}$									63 $\frac{1}{2}$

Sheet No. 12

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter-sink and planer	Bending slab and furnace	Crane and operator	Draftsman
Brought forward				1011 $\frac{1}{2}$	458 $\frac{1}{4}$	320 $\frac{3}{4}$	463 $\frac{1}{2}$									63 $\frac{1}{2}$
Amson 43	C. Chaquette	9/11	338	6	3											
" 44	"	9/16	"			9										
" 44	"	9/15	"			2										
" 44	"	9/14	"			1										
" 44	"	9/15	"			2										
" 45	V. Williams	9/20	323		1											
" 45	"	9/20	"		6											
" 45	"	9/18	"		8 $\frac{1}{2}$											
" 45	"	9/17	"		2											
" 45	"	9/17	"		2											
" 45	"	9/16	"		1 $\frac{1}{2}$											
" 45	"	9/15	"		2											
" 45	"	9/15	"		3											
" 45	"	9/14	"		7 $\frac{1}{2}$											
" 45	"	9/13	"		7 $\frac{1}{2}$											
" 45	"	9/8	"		$\frac{1}{2}$											
" 45	"	9/8	"		1 $\frac{1}{2}$											
" 45	"	9/1	"		2											
" 45	"	8/31	"		2											
" 45	"	8/30	"		3 $\frac{1}{2}$											
" 45	"	8/30	"		2											
" 45	"	9/21	"		1											
" 45	"	9/21	"		$\frac{1}{2}$											
" 46	J.B.Pennycott	9/18	324		5											
" 46	"	9/18	"		24 $\frac{1}{4}$											
" 46	"	9/17	"		9											
" 46	"	9/16	"		9											
" 46	"	9/15	"		12 $\frac{3}{4}$											
" 46	"	9/14	"		9											
Carried forward				1017 $\frac{1}{2}$	584 $\frac{1}{4}$	334 $\frac{3}{4}$	463 $\frac{1}{2}$									63 $\frac{1}{2}$



Sheet No. 13

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman
Brought forward				1017 $\frac{1}{2}$	584 $\frac{1}{4}$	334 $\frac{3}{4}$	463 $\frac{1}{2}$									63 $\frac{1}{2}$
Adamson 46	J.B.Pennycott	9/13	324		6											
" 46	"	9/12	"		18			Sunday								
" 46	"	9/22	"		6											
" 47	"	9/10	"		6											
" 47	"	9/9	"		18			Holiday								
" 47	"	9/7	"		2											
" 47	"	9/6	"		9											
" 47	"	9/5	"		18			"								
" 47	"	9/4	"		7											
" 47	"	9/2	"		2											
" 47	"	9/1	"		8 $\frac{3}{4}$											
" 47	"	8/31	"		6 $\frac{3}{4}$											
" 47	"	8/30	"		9											
" 47	"	9/11	"		4 $\frac{1}{2}$											
" 48	Jno. C. Mello	9/13	317		14 $\frac{1}{4}$											
" 48	"	9/19	"		3)			Sunday								
" 48	"	9/19	"		3)			"								
" 48	"	9/19	"			9		"								
" 48	"	9/20	"		1 $\frac{1}{2}$											
" 48	"	9/21	"	4												
" 48	"	9/26	"			36										
" 49	"	8/28	"			9										
" 49	"	8/27	"	7												
" 50	"	8/30	"			4 $\frac{1}{2}$										
" 50	"	8/31	"			25 $\frac{3}{4}$										
" 50	"	9/2	"	2												
" 50	"	9/2	"	1												
" 50	"	9/2	"			13 $\frac{1}{2}$										
" 50	"	9/4	"			14 $\frac{1}{4}$										
Carried forward				1031 $\frac{1}{2}$	727	446 $\frac{3}{4}$	463 $\frac{1}{2}$									63 $\frac{1}{2}$

cet No. 14

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman
Brought forward				1031 $\frac{1}{2}$	727	446 $\frac{3}{4}$	463 $\frac{1}{2}$									63 $\frac{1}{2}$
Samson 50	J. C. Mello	9/5	317			24		Holiday								
" 50	"	9/6	"			26		"								
" 50	"	9/8	"	3				"								
" 50	"	9/9	"	16				"								
" 50	"	9/10	"	14 $\frac{1}{4}$				"								
" 50	"	9/10	"			14 $\frac{1}{4}$		"								
" 50	"	9/11	"			14 $\frac{1}{4}$		"								
" 51	J. Chandler	9/20	316	9												
" 51	"	9/19	"	13				Sunday								
" 51	"	9/17	"	9												
" 51	"	9/16	"	7												
" 51	"	8/28	"	7												
" 51	"	9/21	"	7												
" 52	"	8/30	"	4												
" 52	"	8/31	"	9												
" 52	"	9/1	"	9 $\frac{1}{2}$												
" 52	"	9/2	"	17 $\frac{1}{4}$												
" 52	"	9/3	"	9												
" 52	"	9/4	"	9												
" 52	"	9/5	"	18				Sunday								
" 52	"	9/6	"	18				Holiday								
" 52	"	9/7	"	12 $\frac{3}{4}$												
" 52	"	9/8	"	8												
" 52	"	9/10	"	7												
" 52	"	9/11	"	5												
" 53	W.B. Thomas	9/1	315	5												
" 53	"	9/5	"	9				Sunday								
" 53	"	9/5	"	7		7		"								
" 53	"	9/6	"	6		12		Holiday								
Brought forward				1270 $\frac{1}{4}$	727	544 $\frac{1}{4}$	463 $\frac{1}{2}$									63 $\frac{1}{2}$

Sheet No. 15

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman
Brought forward				1270 $\frac{1}{4}$	727	544 $\frac{1}{4}$	463 $\frac{1}{2}$									63 $\frac{1}{2}$
Adamson 53	W.B.Thomas	9/1	315	2 $\frac{1}{2}$												
" 53	"	9/6	"							Holiday						
" 53	"	9/7	"	2 $\frac{1}{2}$		4) 8 $\frac{1}{4}$ )										
" 53	"	9/8	"	6 $\frac{1}{4}$												
" 53	"	9/9	"	14		4				Holiday						
" 53	"	9/10	"	2												
" 54	"	9/12	"	9		9				Sunday						
" 54	"	9/12	"	5 $\frac{1}{2}$						"						
" 54	"	9/15	"	1		1										
" 54	"	9/17	"	3		2										
" 54	"	9/19	"			8				Sunday						
" 54	"	9/21	"	3		26 $\frac{1}{2}$										
" 55	"	8/25	"	7												
" 55	"	8/26	"	9												
" 55	"	8/27	"													
" 55	"	8/28	"													
" 56	Jos. Sucher	9/1	314	9												
" 56	"	9/3	"	4 $\frac{1}{2}$												
" 56	"	9/4	"	19 $\frac{1}{4}$												
" 56	"	9/8	"	7												
" 57	"	9/13	"	9												
" 57	"	9/14	"	9												
" 57	"	9/15	"	9												
" 57	"	9/16	"	9												
" 57	"	9/20	"	6												
" 57	"	9/22	"	4 $\frac{1}{2}$												
" 57	"	9/21	"	11 $\frac{3}{4}$												
" 58	Fenton Young	9/10	"	9												
" 58	"	9/7	"	12 $\frac{3}{4}$												
Carried forward				1454 $\frac{1}{4}$	727	607	463 $\frac{1}{2}$									63 $\frac{1}{2}$



et No. 16

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman
ught forward				1454 $\frac{1}{4}$	727	607	463 $\frac{1}{2}$									63 $\frac{1}{2}$
erson 58	Fenton Young	9/6	313	18				Sunday								
" 58	"	9/5	"	18				Holiday								
" 58	"	9/3	"	4												
" 58	"	9/2	"	6												
" 58	"	9/1	"	6 $\frac{1}{2}$												
" 58	"	9/11	"	6												
" 59	"	8/28	"	5												
" 60	"	9/15	"	16 $\frac{1}{2}$												
" 60	"	9/16	"	4 $\frac{1}{2}$												
" 60	"	9/17	"	6												
" 61	Gus Albers	9/12	312	18												
" 62	"	9/28	"	3												
" 63	D. Doig, Jr.	8/27	311	21												
" 63	"	8/28	"	13 $\frac{1}{2}$												
" 64	"	8/31	"													
" 64	"	8/31	"	3 $\frac{1}{2}$	2											
" 64	"	8/30	"			7										
" 64	"	8/29	"			24		Sunday								
" 64	"	9/2	"		2											
" 64	"	9/6	"		18			Holiday								
" 64	"	9/8	"	3	9 $\frac{3}{4}$											
" 64	"	9/9	"		3)			Holiday								
" 64	"				3)											
" 64	"	9/10	"		12 $\frac{3}{4}$											
" 64	"	9/11	"		12 $\frac{3}{4}$											
" 65	"	9/12	"		23			Sunday								
" 65	"	9/13	"		12 $\frac{3}{4}$											
" 65	"	9/14	"		12 $\frac{3}{4}$											
" 65	"	9/15	"		6											
" 65	"	9/17	"		12 $\frac{3}{4}$											
ed forward				1606 $\frac{3}{4}$	857 $\frac{1}{2}$	638	463 $\frac{1}{2}$									63 $\frac{1}{2}$

Sheet No. 17

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman
Brought forward				1606 $\frac{3}{4}$	857 $\frac{1}{2}$	638	463 $\frac{1}{2}$									63 $\frac{1}{2}$
Adamson 66	Clen Perrsons	8/27	318				9									
" 66	"	8/28	"				9									
" 67	"	9/3	"	9												
" 67	"	9/4	"	8												
" 67	"	9/1	"				9									
" 67	"	8/31	"				9									
" 67	"	9/7	"	7	2											
" 68	"	9/14	"	8												
" 69	Jno. Ross	9/15	348	1 $\frac{1}{2}$												
" 69	"	9/14	"	9												
" 70	W. P. Hicks	9/13	388	1 $\frac{1}{2}$												
" 70	"	9/15	"	2 $\frac{1}{2}$												
" 70	"	"	"	1												
" 70	"	"	"	2												
" 70	"	9/16	"	1 $\frac{1}{2}$												
" 70	"	9/17	"	1												
" 70	"	"	"	3 $\frac{1}{2}$												
" 70	"	"	"	1 $\frac{1}{2}$												
" 70	"	9/18	"	4 $\frac{1}{2}$												
" 70	"	9/20	"	3 $\frac{1}{2}$												
" 71	N. Vason	9/13	387				1									
" 71	"	9/16	"				1									
" 72	"	8/30	"				2									
" 72	"	8/31	"				3 $\frac{1}{2}$									
" 72	"	9/1	"				3									
" 72	"	9/2	"				8									
" 72	"	9/7	"				4 $\frac{1}{2}$									
" 72	"	9/8	"				7									
" 72	"	9/10	"				4									
Carried forward				1671 $\frac{3}{4}$	859 $\frac{1}{2}$	674	497 $\frac{1}{2}$									63 $\frac{1}{2}$

Sheet No. 18

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinis	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman
Brought forward				1671 $\frac{3}{4}$	859 $\frac{1}{2}$	674	497 $\frac{1}{2}$									63 $\frac{1}{2}$
Amson 73	N. Vason	8/27	387				3									
" 73	"	8/28	"				6									
" 74	Jose Francisco	8/27	386				3									
" 74	"	8/28	"				5									
" 75	"	9/13	"				1									
" 76	"	8/30	"				5									
" 76	"	8/31	"				4 $\frac{1}{2}$									
" 76	"	9/1	"				6									
" 76	"	9/2	"				9									
" 76	"	9/3	"				4									
" 76	"	9/3	"				3									
" 76	"	9/4	"				4									
" 76	"	9/4	"				3									
" 76	"	9/7	"				3									
" 76	"	9/7	"				2									
" 76	"	9/8	"				2									
" 76	"	9/9	"				3									
" 77	Geo. A. Dunne	8/30	385	2												
" 77	"	8/31	"	8												
" 77	"	9/6	"		18			Holiday								
" 77	"	8/30	"													
" 77	"	8/31	"													
" 77	"	9/6	"													
" 78	Rud. Dolensky	8/28	377	9												
" 79	"	8/30	"	9												
" 79	"	8/31	"	9												
" 79	"	9/1	"	2												
" 79	"	9/1	"	8 $\frac{1}{4}$												
" 79	"	9/2	"	13 $\frac{3}{4}$												
Brought forward				1732 $\frac{3}{4}$	877 $\frac{1}{2}$	674	564									63 $\frac{1}{2}$



Sheet No. 19

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by											
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator
B. Brought forward				1732 $\frac{3}{4}$	877 $\frac{1}{2}$	674	564								63 $\frac{1}{2}$
A Adamson	79 Rud.Dolensky	9/3	377	9											
"	79 "	9/4	"	9											
"	80 J. Jackson	9/1	370	4											
"	80 "	9/1	"	3											
"	80 "	9/1	"	9 $\frac{3}{4}$											
"	81 B. Materne	8/30	360	6 $\frac{1}{2}$											
"	81 "	8/31	"	4 $\frac{1}{2}$											
"	82 J.B.Gordon	9/14	368	9											
"	82 "	9/15	"	16 $\frac{1}{2}$											
"	82 "	9/16	"	10 $\frac{1}{4}$											
"	82 "	9/17	"	6											
"	82 "	9/21	"	9											
"	83 B. Materne	8/28	360	9											
"	84 M.B.Souza	9/10	367	8											
"	85 "	9/13	"		2 $\frac{1}{2}$										
"	85 "	9/14	"		3)										
"	85 "	9/15	"		4)										
"	85 "	9/16	"		3										
"	85 "	9/16	"		10 $\frac{1}{2}$										
"	85 "	9/22	"		$\frac{1}{2}$										
"	86 H.Sutherland	9/1	366		7										
"	86 "	9/2	"			9									
"	86 "	9/3	"		6										
"	86 "	9/4	"		1										
"	87 J.Cameron	8/23	352	7											
"	88 T.Pickersgill	9/17	351	$\frac{1}{2}$											
"	88 "	9/20	"	$\frac{1}{2}$											
"	89 "	9/8	"	$\frac{1}{2}$											
"	89 "	9/10	"	$\frac{3}{4}$											
"	89 "	9/11	3	2											
C. Carried forward				1857 $\frac{3}{4}$	915	683	564								63 $\frac{1}{2}$

No. 20

hibit mber	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman
t forward				1857 $\frac{3}{4}$	915	683	564									63 $\frac{1}{2}$
on 90	S. D. Doig	9/16	350				6									
90	"	9/20	"				9									
91	"	9/8	"				8									
91	"	9/10	"				7									
91	"	9/11	"				4 $\frac{1}{2}$									
92	Geo.Cuthbert	8/30	349	1												
92	"	9/14	"		2											
92	"	9/18	"	3 $\frac{1}{2}$												
93	"	9/10	"		2											
94	Wm.Schmidt	8/29	318			8		Sunday								
94	"	8/30	"	2		4										
94	"	8/30	"			8 $\frac{1}{4}$										
94	"	8/31	"			17 $\frac{1}{4}$										
94	"	9/1	"			17 $\frac{1}{4}$										
94	"	9/2	"	4 $\frac{1}{2}$		14 $\frac{1}{4}$										
94	"	9/3	"			3										
94	"	9/3	"			12 $\frac{1}{2}$	7 $\frac{1}{2}$									
94	"	9/3	"	8 $\frac{1}{4}$												
94	"	9/4	"			9 $\frac{3}{4}$										
94	"	9/5	"			18		Holiday								
94	"	9/6	"			6		"								
94	"	9/6	"	9				"								
94	"	9/6	"			16		"								
94	"	9/7	"			12 $\frac{3}{4}$										
94	"	9/8	"			9										
94	"	9/9	"			8		Holiday								
94	"	9/10	"			1										
95	"	8/27	"	12												
96	"	9/18	"			1 $\frac{1}{2}$										
eforward				1898	919	845	598 $\frac{1}{2}$								63 $\frac{1}{2}$	

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by											
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator
Brought forward				1898	919	845	598 $\frac{1}{2}$								63 $\frac{1}{2}$
Adamson	96	Wm. Schmidt	9/19	318	22										
"	97	R. Turner	9/6	319	21					Holiday					
"	97	"	9/7	"	8										
"	97	"	9/8	"	5										
"	97	"	9/9	"	18										
"	98	"	9/12	"	18					Sunday					
"	98	"	9/19	"	6					"					
"	99	R. Adamson	9/13	320	4										
"	99	"	9/14	"	3										
"	99	"	9/15	"	4										
"	99	"	9/16	"	2										
"	99	"	9/16	"	3 $\frac{3}{4}$										
"	99	"	9/17	"	2										
"	99	"	9/20	"	2										
"	99	"	9/20	"	3										
"	99	"	9/20	"	1 $\frac{1}{2}$										
"	99	"	9/2	"	3										
"	99	"	9/2	"	4 $\frac{1}{2}$										
"	100	"	8/24	"	2										
"	100	"	8/27	"	4										
"	100	"	8/27	"	2 $\frac{1}{4}$										
"	100	"	8/28	"	4										
"	101	"	8/30	"	5										
"	101	"	8/31	"	3										
"	101	"	9/1	"	3										
"	101	"	9/2	"	4										
"	101	"	9/3	"	3										
"	101	"	9/3	"	4 $\frac{1}{2}$										
"	101	"	9/4	"	6										
Carried forward															
				2047 $\frac{1}{2}$	941	845	598 $\frac{1}{2}$								63 $\frac{1}{2}$



st No. 22

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter-sink and planer	Bending slab and furnace	Crane and operator	Draftsman
ight forward				2047 $\frac{1}{2}$	941	845	598 $\frac{1}{2}$									63 $\frac{1}{2}$
anson 101	R. Adamson	9/8	320	3												
" 101	"	9/8	"	3												
" 101	"	9/8	"	$\frac{3}{4}$												
" 101	"	9/9	"	14				Holiday								
" 101	"	9/10	"	4												
" 101	"	9/11	"	6												
" 102	F. C. Heath	8/27	321		1 $\frac{1}{2}$											
" 102	"	8/30	"		1											
" 102	"	8/30	"		3 $\frac{1}{2}$											
" 102	"	8/31	"		9											
" 102	"	9/3	"		4 $\frac{1}{2}$											
" 102	"	9/4	"		3											
" 102	"	9/7	"		8											
" 102	"	9/8	"		$\frac{1}{2}$											
" 102	"	9/10	"		7											
" 102	"	9/11	"		1											
" 103	"	9/13	"		2											
" 103	"	9/14	"	1 $\frac{1}{2}$												
" 103	"	9/15	"		3											
" 103	"	"	"		2 $\frac{1}{4}$											
" 103	"	9/16	"													
" 103	"	9/16	"		1 $\frac{1}{2}$											
" 103	"	9/16	"		1											
" 103	"	9/16	"		2											
" 103	"	9/16	"		2											
" 103	"	9/17	"		1 $\frac{1}{2}$											
" 103	"	"	"		2 $\frac{1}{2}$											
" 103	"	9/18	"		2 $\frac{1}{2}$											
" 103	"	9/20	"		$\frac{1}{4}$											
rd forward				2079 $\frac{3}{4}$	1000 $\frac{1}{2}$	845	598 $\frac{1}{2}$									63 $\frac{1}{2}$

Sheet No. 23

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	
Brought forward				2079 $\frac{3}{4}$	1000 $\frac{1}{2}$	845	598 $\frac{1}{2}$									63 $\frac{1}{2}$
Adamson	103 F. C. Heath	9/21	321		2											
"	103 "	9/21	"		1 $\frac{1}{2}$											
"	103 "	9/21	"		1											
"	103 "	9/21	"		6											
"	103 "	9/22	"		3											
"	104 C. Peaslee	8/28	334	6 $\frac{1}{2}$												
"	105 W. Bonick	9/19	359	18				Sunday								
"	105 "	9/20	"	4												
"	106 H. Beckett	9/10	369	5 $\frac{1}{2}$												
"	107 Jas. Furman	8/31	541		2 $\frac{3}{4}$	11 $\frac{1}{4}$										
"	107 "	9/2	541			12 $\frac{3}{4}$										
"	107 "	9/3	"			12 $\frac{3}{4}$										
"	107 "	9/4	"		4 $\frac{1}{2}$	4 $\frac{1}{2}$										
"	107 "	9/4	"		3 $\frac{3}{4}$											
"	107 "	9/5	"			4		Holiday								
"	107 "	9/6	"	23				"								
"	107 "	9/7	"		3											
"	107 "	9/7	"		3 $\frac{3}{4}$											
"	107 "	9/8	"		5											
"	107 "	9/11	"		9	3 $\frac{3}{4}$										
"	108 W. P. Hicks	8/30	388	5 $\frac{1}{2}$												
"	108 "	8/31	"	9												
"	108 "	9/1	"	3 $\frac{1}{2}$ )												
"	108 "			5 $\frac{1}{2}$ )												
"	108 "	9/2	"	1												
"	108 "	9/4	"	1												
"	108 "	9/7	"	$\frac{1}{10}$												
"	108 "	9/7	"	4												
"	108 "	9/7	"	$\frac{1}{2}$												
"	108 "	9/8	"	5												
"	108 "	9/10	"	4												
Carried forward				2176 $\frac{1}{4}$	1045 $\frac{1}{4}$	894	598 $\frac{1}{2}$									63 $\frac{1}{2}$

et No. 24

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman
ught forward				2176 $\frac{1}{4}$	1045 $\frac{1}{4}$	894	598 $\frac{1}{2}$									
mson 109	W. P. Hicks	8/26	388	5												63 $\frac{1}{2}$
" 109	"	8/27	"	3 $\frac{1}{2}$												
" 109	"	8/28	"	6												
" 110	Jno. Moork	9/4	504		2 $\frac{1}{2}$											
" 111	A. L. Hanson	9/14	553	2												
" 112	C. Holinquist	9/5	550				12	Holiday								
" 112	"	9/7	"				9									
" 113	Ed Acosta	9/16	543				3									
" 113	"	9/17	"				1									
" 113	"	9/18	"				1									
" 114	Ed Brauns	9/8	566	3 $\frac{1}{2}$												
" 115	"	9/15	"	5												
" 115	"	9/16	"	5 $\frac{1}{2}$												
" 116	Joe Zaber	9/11	540	6												
" 117	Jas. Furman	9/12	541		2			Sunday								
" 117	"	9/12	"		2											
" 117	"	9/12	"			5										
" 117	"	9/13	"	3	9 $\frac{3}{4}$											
" 117	"	9/14	"	3 $\frac{3}{4}$	1	5										
" 117	"	9/15	"		10 $\frac{1}{2}$											
" 117	"	9/18	"			6										
" 117	"	9/18	"			4 $\frac{1}{2}$										
" 117	"	9/19	"		6)			Sunday								
" 117	"	9/19	"		6)			"								
" 117	"	9/19	"		2)			"								
" 117	"	9/19	"		6)											
" 118	Ed Acosta	8/31	543				2 $\frac{1}{2}$									
" 118	"	9/1	"				4									
" 118	"	9/2	"				2									
" 118	"	9/3	"				5									
nd forward				2219 $\frac{1}{2}$	1093	914 $\frac{1}{2}$	638									63 $\frac{1}{2}$



Sheet No. 25

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draughtsman
Brought forward				2219 $\frac{1}{2}$	1093	914 $\frac{1}{2}$	638									
Adamson 118	Ed Acosta	9/4	543				9								63 $\frac{1}{2}$	
" 118	"	9/7	"				5									
" 118	"	9/8	"				2									
" 119	W. Stewart	9/13	545			9										
" 119	"	9/15	"			1										
" 119	"	9/18	"			4 $\frac{1}{2}$										
" 120	"	9/1	"	9												
" 120	"	9/3	"			9										
" 120	"	9/4	"			7										
" 120	"	9/7	"	7												
" 121	M. W. Albers	8/31	548		13 $\frac{1}{2}$											
" 121	"	9/2	"		13											
" 121	"	9/3	"		12 $\frac{3}{4}$											
" 121	"	9/4	"		12 $\frac{3}{4}$											
" 121	"	9/7	"		12 $\frac{3}{4}$											
" 121	"	9/9	"		11)			Holiday								
" 121	"	9/9	"		6)			"								
" 121	"	9/10	"		6											
" 121	"	9/11	"		3 )											
" 121	"	"	"		4 $\frac{1}{4}$ )											
" 122	J. Reed	9/5	552	18				Sunday								
" 122	"	9/6	"		6			Holiday								
" 122	"	9/6	"		6			"								
" 122	"	9/6	"		4			"								
" 123	L. DePasquale	9/10	555	1 $\frac{1}{2}$												
" 123	"	9/11	"	1 $\frac{1}{2}$												
" 123	"	9/11	"	1 $\frac{1}{2}$												
" 123	"	9/11	"	1												
" 123	"	9/11	"	4												
" 123	"	9/11	"	1 $\frac{1}{2}$												
Carried forward				2263 $\frac{1}{2}$	1204	945	654								63 $\frac{1}{2}$	

Sheet No. 26

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by										Crane and operator	Draftsman
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter-sink and planer	Bending slab and furnace	
Brought forward				2263 $\frac{1}{2}$	1204	945	654								63 $\frac{1}{2}$
Amson 124	D. Pasquale	9/13	555	9											
" 124	"	9/15	"	3											
" 124	"	9/15	"	1 $\frac{1}{2}$											
" 124	"	9/15	"	1 $\frac{1}{2}$											
" 124	"	9/16	"	5 $\frac{1}{2}$											
" 124	"	9/16	"	$\frac{1}{2}$											
" 124	"	9/16	"	1											
" 124	"	9/17	"	4											
" 124	"	"	"	1											
" 124	"	9/18	"	8											
" 125	O. Sweeny	9/8	556	2											
" 125	"	9/10	"	9											
" 125	"	9/11	"	5											
" 126	"	9/13	"	5											
" 126	"	9/14	"	7											
" 127	J. Williams	9/12	557		14			Sunday							
" 127	"	9/14	"		12 $\frac{3}{4}$										
" 127	"	9/17	"		8										
" 127	"	9/19	"					Sunday							
" 128	"	8/29	"		23			Sunday							
" 128	"	9/4	"		12 $\frac{3}{4}$										
" 128	"	9/5	"	10				Sunday							
" 128	"	9/6	"		23			Holiday							
" 128	"	9/8	"		2										
" 128	"	9/10	"		2										
" 128	"	9/10	"		9 $\frac{3}{4}$										
" 128	"	9/11	"		12 $\frac{3}{4}$										
" 129	J. Coleman	9/8	559	8 $\frac{1}{4}$											
" 130	S. Greve	9/8	562		11 $\frac{3}{4}$										
Brought forward				2344 $\frac{3}{4}$	1335 $\frac{1}{4}$	945	654								63 $\frac{1}{2}$

Sheet No. 27

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman
Brought forward				2344 $\frac{3}{4}$	1335 $\frac{1}{4}$	945	654									63 $\frac{1}{2}$
Adamson 130	S. Greve	9/10	562		4 $\frac{1}{2}$											
" 130	"	9/11	"		6 $\frac{1}{2}$											
" 131	"	9/13	"		9											
" 131	"	9/14	"		6 $\frac{1}{2}$											
" 131	"	9/15	"		5											
" 131	"	9/18	"		2											
" 131	"	9/17	"		1											
" 131	"	9/20	"		5											
" 131	"	9/21	"		6 $\frac{1}{2}$											
" 132	J. Blake	9/1	551			5 $\frac{1}{2}$										
" 132	"	9/2	"			4										
" 132	"	"	"			2 $\frac{1}{2}$										
" 132	"	9/3	"			2										
" 132	"	9/4	"			9										
" 132	"	9/7	"			2										
" 132	"	9/8	"			1										
" 133	T. McConkey	8/30	530	4												
" 133	"	9/1	"	7												
" 133	"	9/2	"	5												
" 133	"	9/3	"	4												
" 134	"	9/10	"	4												
" 135	J. Blake	9/14	531			3										
" 135	"	9/15	"			4 $\frac{1}{2}$										
" 135	"	9/16	"		2 $\frac{1}{2}$											
" 135	"	9/18	"		4											
" 135	"	9/21	"			2										
Carried forward				2368 $\frac{3}{4}$	1387 $\frac{3}{4}$	980 $\frac{1}{2}$	654									63 $\frac{1}{2}$



et No. 28

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman
ught forward				2368 $\frac{3}{4}$	1387 $\frac{3}{4}$	980 $\frac{1}{2}$	654									63 $\frac{1}{2}$
anson 136	W. Robertson	8/30	510	9												
" 136	"	8/31	"	4 $\frac{1}{2}$												
" 137	Wm. Albee	9/12	548		1 $\frac{1}{2}$			Sunday								
" 137	"	9/12	"	2				"								
" 137	"	9/12	"	4				"								
" 137	"	9/12	"	7	2 $\frac{1}{2}$			"								
" 137	"	9/12	"		6			"								
" 137	"	9/15	"		6 $\frac{1}{2}$											
" 137	"	9/15	"		4 $\frac{1}{4}$											
" 137	"	9/16	"		6											
" 138	Wm. Boehle	8/30	529	4 $\frac{1}{2}$												
" 138	"	8/31	"	5												
" 139	"	9/18	"	2												
" 139	"	9/18	"	3												
" 140	W. Robertson	8/28	510	9												
" 141	"	9/13	"	1												
ri Boyd 1	Fred Boyd	8/24	337		3											
" 2	"	8/26	"		9											
" 3	"	8/27	"	9												
" 4	"	8/28	"		9											
" 5	"	8/29	"		18			Sunday								
" 7	"	8/30	"		5											
" 8	"	8/31	"		4											
" 9	"	9/1	"		6											
" 9	"	9/1	"		6											
" 10	"	9/5	"		18			Sunday								
" 11	"	9/6	"		7			Holiday								
" 12	"	9/7	"		1											
" 12	"	9/7	"		1 $\frac{1}{2}$											
ated forward				2428 $\frac{3}{4}$	1502	980 $\frac{1}{2}$	654									63 $\frac{1}{2}$

Sheet No. 29

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman
Brought forward				2428 $\frac{3}{4}$	1502	980 $\frac{1}{2}$	654									63 $\frac{1}{2}$
Boyd 13	Fred Boyd	9/9	337		18			Holiday								
" 14	"	9/10	"		9											
" 15	"	9/11	"		19 $\frac{1}{4}$											
" 16	"							Clock card								
" 17	"	9/14	"		6 $\frac{3}{4}$											
" 18	"	9/15	"		6											
" 19	"	9/12	"		11			Sunday								
" 20	"	9/16	"		3											
Adamson 22 $\frac{1}{2}$ and Allen 1	Martiolla	9/24	344				2									
Carried forward				2428 $\frac{3}{4}$	1575	980 $\frac{1}{2}$	656									63 $\frac{1}{2}$

et No. 30

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman
ught forward																
Macdonald 1	Macdonald	9/14	611	2428 $\frac{3}{4}$	1575	980 $\frac{1}{2}$	656								63 $\frac{1}{2}$	2
" 1	"	9/14	"													4 $\frac{1}{4}$
" 1	"	8/25	"													1
" 3	"	8/26	"													2
" 4	"	8/27	"													4
" 5	"	9/4	"													2 $\frac{1}{2}$
" 6	"		611					Clock card								
" 7	"		611					Clock card								
" 7 $\frac{1}{2}$	"		611					" "								
" 8	M. Merkeli	9/15	613													$\frac{1}{2}$
" 9	"							Clock card								
" 10	P. B. Young	9/13	612													2 $\frac{1}{2}$
" 11	"		612					Clock card								
" 12	"	8/27	612													5 $\frac{1}{2}$
" 13	"	8/31	612													8
" 14	"	9/1	612													7
" 15	"	9/2	612													4 $\frac{1}{2}$
" 16	"	9/4	612													3
" 17	"	9/7	612													1
" 18	"	9/8	612													2
" 19	"	9/10	612													1
" 20	"	9/11	612													1
" 21	"		"					Clock card								
" 22	"		"					"								
refend 1	C. Grotefend	9/23	1	4 $\frac{1}{2}$												
" 2	L. Schaarky	9/23	4	1												
" 3	Nolan	9/23	6		3											
" 4	Jos. Turner	9/22	9	2												
" 5	"	9/23	9		3 $\frac{1}{2}$											
ated forward				2436 $\frac{1}{4}$	1581 $\frac{1}{2}$	980 $\frac{1}{2}$	656								63 $\frac{1}{2}$	51 $\frac{3}{4}$



Sheet No. 31

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman
Brought forward				2436 $\frac{1}{4}$	1581 $\frac{1}{2}$	980 $\frac{1}{2}$	656								63 $\frac{1}{2}$	51 $\frac{1}{2}$
Grotefend	5 Jos. Turner	9/23	9		2											
"	6 Jno. Seelos	9/23	13	2												
"	7 A. Campbell	9/22	14	1 $\frac{1}{2}$												
"	8 "	9/23	"	2 $\frac{1}{2}$												
"	8 "	9/23	"	1 $\frac{1}{2}$												
"	8 "	9/23	"	4 $\frac{1}{2}$												
"	9 "	9/24	"	6												
G. LaViolette	1 G. LaViolette	8/24	507	2 $\frac{1}{4}$												
"	2 "	8/27	"	5												
"	3 "	9/10	"	2												
"	3 "	9/10	"	2												
"	4 "	9/11	"	1												
"	4 "	9/11	"	2												
"	5 "	8/30	"													
"	5 "	"	"	4												
"	5 "	"	"	1												
"	5 "	"	"													
"	6 "	8/31	"	2												
"	7 "	9/1	"	3												
"	8 "	9/8	"	2												
"	8 "	"	"	3												
"	9 "	9/13	"	1												
"	9 "	9/13	"	2												
"	10 "	9/14	"	1												
"	10 "	9/14	"	1												
"	10 "	9/14	"	1												
"	11 "	9/16	"	1												
"	11 "	9/16	"	2												
"	12 "	9/20	"	3					Sunday							
Carried forward				2495 $\frac{1}{2}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	656								63 $\frac{1}{2}$	51 $\frac{1}{2}$

et No. 32

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman
ight forward				2495 $\frac{1}{2}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	656								63 $\frac{1}{2}$	51 $\frac{3}{4}$
a Violette 13	G. La Violette	9/22	507	1												
" 14	"	9/23	"	1												
" 15	"	9/24	"	1												
" 15	"	9/24	"	3 $\frac{1}{4}$												
L. Roberts 1	R. H. Roberts	9/3	302	3												
" 2	"	9/4	"	1 $\frac{1}{2}$												
" 3	"	9/5	"	25				Sunday								
" 4	"	9/6	"	18				Holiday								
" 5	"	9/7	"	3												
" 6	"	9/8	"	6												
" 7	"	9/9	"	18				Holiday								
" 8	"	9/10	"	7 $\frac{1}{2}$												
" 9	"	9/11	"	3												
" 10	"	9/12	"	19				Sunday								
" 11	"	9/13	"	1 $\frac{1}{2}$												
" 12	"	9/14	"	4 $\frac{1}{2}$												
" 13	"	9/15	"	1 $\frac{1}{2}$												
" 14	"	9/16	"	3												
" 15	"	9/18	"	3												
" 16	"	9/19	"	10												
" 17	"	9/20	"	$\frac{3}{4}$												
" 18	"	9/21	"	6												
" 19	"		"					Clock card								
" 20	"		"					"								
ron 1	S. Cronin	9/3	177	10 $\frac{1}{2}$												
" 2	"	9/4	"	5 $\frac{1}{4}$												
" 3	"	9/5	"	16				Sunday								
" 4	"	9/6	"	24				Holiday								
" 5	"	9/7	"	9												
ned forward				2700 $\frac{3}{4}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	656								63 $\frac{1}{2}$	51 $\frac{3}{4}$

Sheet No. 33

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman
Brought forward				2700 $\frac{3}{4}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	656								63 $\frac{1}{2}$	51 $\frac{1}{4}$
Cronin	6 S. Cronin	9/9	177	6				Holiday								
"	7 "	9/10	"	1 $\frac{1}{2}$												
"	8 "	9/11	"	8 $\frac{1}{4}$												
"	9 "	9/12	"	18				Sunday								
"	10 "	9/13	"	7 $\frac{1}{2}$												
"	11 "	9/15	"	4 $\frac{1}{2}$												
"	12 "	9/17	"	4 $\frac{1}{2}$												
"	13 "	9/20	"	4 $\frac{1}{2}$												
"	14 "		"					Clock cards								
"	15 "		"					"								
Carried forward				2755 $\frac{1}{2}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	656								63 $\frac{1}{2}$	51 $\frac{1}{4}$



et No. 34

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by															
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman			
ught forward				2755 $\frac{1}{2}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	656									63 $\frac{1}{2}$	51 $\frac{3}{4}$		
2	A. Beaton	9/10	117					1 $\frac{1}{2}$											
3	F.Campbell	9/14	115					1											
3	"	9/14	"					2											
4	"	9/15	"					2											
5	"	9/20	"					8											
6	"	9/21	"					1											
6	"	9/21	"					1				$\frac{1}{2}$							
6	"	9/21	"					2				2							
7	"	9/22	"					4 $\frac{1}{2}$											
8	"	9/24	"					2											
9	"							Clockcards											
10	H. Olsen	9/14	117					7 $\frac{1}{2}$											
11	"	9/15	"					1 $\frac{1}{2}$											
11	"	9/15	"					4				2							
12	"	9/16	"					1 $\frac{1}{2}$											
12	"	9/16	"					2				$\frac{1}{2}$							
13	"	9/18	"					2 $\frac{1}{2}$											
14	"							Clockcards											
15	T.Campbell	8/25	115					$\frac{1}{2}$											
16	"	8/26	"					1 $\frac{1}{2}$											
17	"	8/27	"					1											
18	"	8/28	"					7											
19	"							Clockcards											
20	Jno.Edwards	9/15	118					1				1							
21	"	9/16	"									2 $\frac{1}{2}$							
22	"	9/16	"					3				1							
22	"	9/17	"					4 $\frac{1}{2}$											
22	"	9/17	"					1 $\frac{1}{2}$											
23	"	9/18	"					1											
23	"	9/18	"					1 $\frac{1}{2}$											
ed forward				2755 $\frac{1}{2}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	656	66 $\frac{1}{2}$				9 $\frac{1}{2}$				63 $\frac{1}{2}$	51 $\frac{3}{4}$		

Sheet No. 35

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman
Brought forward				2755 $\frac{1}{2}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	656	66 $\frac{1}{2}$				9 $\frac{1}{2}$			63 $\frac{1}{2}$	51 $\frac{1}{2}$
Allen	24 J. Edwards	9/20	118					1)								
"	25 "	9/21	"					2)								
"	26 "	9/22	"					1				$\frac{1}{2}$				
"	27 "							1				$\frac{1}{2}$				
"	28 H.O.Erickson	8/30	119							Clockcards						
"	"	8/30	"					$\frac{1}{2}$								
"	29 "	8/31	"					2 $\frac{1}{2}$				2				
"	30 "	9/2	"					1								
"	31 "	9/7	"					1								
"	32 "	9/8	"					1 $\frac{1}{2}$				1				
"	33 "									Clockcards						
"	34 "	8/27	"									1 $\frac{1}{2}$				
"	35 "	8/28	"					$\frac{1}{2}$								
"	36 "									Clockcards						
"	37 "	9/12	"					1		Sunday						
"	38 "	9/13	"					1								
"	39 "	9/15	"					$\frac{1}{2}$				$\frac{1}{2}$				
"	40 "	9/17	"					1 $\frac{1}{2}$								
"	41 "	9/21	"					2								
"	41 "	9/21	"					2				1				
"	42 "	9/22	"					2				1				
"	43 "									Clockcards						
"	44 G. Scala	9/15	121					3								
"	45 "									Clockcards						
"	46 Jno. Edwards	8/27	118									3				
"	47 "	8/28	"									3				
"	48 "	8/31	"									3 $\frac{1}{2}$				
"	49 "	9/4	"					2 $\frac{1}{2}$								
"	50 "	9/3	"					1 $\frac{1}{2}$				1				
Carried forward				2755 $\frac{1}{2}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	656	94 $\frac{1}{2}$				28			63 $\frac{1}{2}$	51 $\frac{1}{2}$

Sheet No. 36

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman
Brought forward				2755½	1583½	980½	656	94½				28			63½	51¾
51	Jno. Edwards	9/11	118					2				1½				
"	"	9/11	"					½				½				
"	"	9/11	"					½								
"	"							Clockcards								
"	53 T. Campbell	8/30	115					9								
"	54 "	8/31	"					1								
"	54 "	8/31	"					2								
"	55 "	9/2	"									1				
"	55 "	9/2	"									3				
"	56 "	9/1	"					5½								
"	57 "	9/7	"					2								
"	58 "	9/8	"					4								
"	59 "	9/11	"					3								
"	60 "							Clockcards								
"	61 G. Allen	8/25	116					1								
"	62 "	8/28	"									4				
"	63 "							Clockcards								
"	64 "	8/30	"									4½				
"	65 "	8/31	"									6				
"	66 "	9/1	"					2								
"	67 "	9/4	"									9				
"	68 "	9/6	"									5				
"	69 "	9/7	"									2½				
"	70 "	9/8	"					2½				1				
"	70 "	9/8	"					1¾								
"	71 "	9/10	"					4½				2				
"	71 "	9/10	"					1				½				
"	72 "	9/11	"					2½				2				
Brought forward				2755½	1583½	980½	656	139¼				69½			63½	51¾



Sheet No. 37

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by											
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator
Br	Brought forward			2755 $\frac{1}{2}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	656	139 $\frac{1}{4}$				69 $\frac{1}{2}$			63 $\frac{1}{2}$
All	Allen	74	G. Allen	9/12	116			3)							
	"	74	"	9/12	"			3)		Sunday		1)			
	"	75	"	9/14	"			2)				1)			
	"	75	"	9/14	"			2)				1)			
	"	75	"	9/14	"			1				$\frac{1}{2}$			
	"	75	"	9/14	"			1 $\frac{1}{2}$				1			
	"	75	"	9/14	"			$\frac{1}{4}$				$\frac{1}{2}$			
	"	75	"	9/14	"			$\frac{1}{2}$				$\frac{1}{4}$			
	"	76	"	9/15	"			$\frac{1}{2}$				$\frac{1}{4}$			
	"	76	"	9/15	"			2				1			
	"	77	"	9/16	"			2 $\frac{1}{2}$				2			
	"	78	"	9/17	"			1 $\frac{1}{2}$				$\frac{1}{2}$			
	"	78	"	9/17	"			$\frac{3}{4}$				$\frac{3}{4}$			
	"	79	"	9/18	"			2 $\frac{1}{2}$							
	"	79	"	9/18	"			5							
	"	80	"	9/19	"			1		Sunday					
	"	80	"	9/19	"			9		"					
	"	80	"	9/19	"			3		"					
	"	81	"	9/20	"			1							
Carried forward						2755 $\frac{1}{2}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	656	181 $\frac{1}{2}$			77 $\frac{3}{4}$		63

No. 38

Exhibit number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by													
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman	
ht forward				2755 $\frac{1}{2}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	656	181 $\frac{1}{2}$				77 $\frac{3}{4}$				63 $\frac{1}{2}$	51 $\frac{3}{4}$
Doig 1	Dave Doig	9/15	301						5								
1	"	9/15	"						4 $\frac{1}{2}$								
1	"	9/14	"						17 $\frac{1}{2}$								
1	"	9/12	"						26	Sunday							
1	"	8/25	"						4								
1	"	8/26	"						9 $\frac{3}{4}$								
1	"	8/27	"						9								
1	"	8/28	"						15 $\frac{1}{4}$								
1	"	8/29	"						28	Sunday							
1	"	9/15	"						5								
1	"	"	"						2								
1	"	9/16	"						3								
1	"	9/17	"						3								
1	"	"	"						2								
1	"	9/19	"						10	Sunday							
1	"	9/20	"						3								
1	"	9/20	"						3								
1	"	8/30	"						17 $\frac{1}{2}$								
1	"	8/31	"						5								
1	"	9/2	"						8								
1	"	9/3	"						4								
1	"	9/3	"						3								
1	"	9/4	"						13								
1	"	9/7	"						16								
1	"	9/8	"						6								
1	"	9/8	"						4								
1	"	9/9	"						24	Holiday							
1	"	9/10	"						16								
1	"	9/11	"						17 $\frac{1}{2}$								
ht forward				2755 $\frac{1}{2}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	656	181 $\frac{1}{2}$	284			77 $\frac{3}{4}$				63 $\frac{1}{2}$	51 $\frac{3}{4}$

Sheet No. 39

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by											
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator
Br	Brought forward			2755 $\frac{1}{2}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	656	181 $\frac{1}{2}$	284			77 $\frac{3}{4}$			63 $\frac{1}{2}$
Al	Ed Smith	1	Ed Smith	9/4	393	1 $\frac{1}{2}$									
	"	1	"	8/27	"	9									
	"	1	"	8/28	"	9									
	"	1	"	8/30	"	9									
	"	1	"	8/31	"	9									
	"	1	"	9/1	"	4 $\frac{1}{2}$									
	"	1	"	9/3	"	4 $\frac{1}{2}$									
	"	1	"	9/7	"	1 $\frac{1}{2}$									
	"	1	"	9/7	"	2 $\frac{1}{2}$									
	"	1	"	9/10	"	1 $\frac{1}{2}$									
	"	1	"	9/11	"	4									
	"	1	"	9/12	"	16			Holiday						
	"	1	"	9/14	"	2 $\frac{1}{2}$									
	"	1	"	9/15	"	7									
	"	1	"	9/16	"	1									
"	1	"	"	"	1										
"	1	"	9/18	"	3 $\frac{1}{2}$										
	Carried forward					2842 $\frac{1}{2}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	656	181 $\frac{1}{2}$	284		77 $\frac{3}{4}$		63 $\frac{1}{2}$



t No. 40

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by													
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman	
Night forward				2842 $\frac{1}{2}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	656	181 $\frac{1}{2}$	284			77 $\frac{3}{4}$			3	63 $\frac{1}{2}$	51 $\frac{3}{4}$
Miller	1 Gardner	8/30	112												3		
"	2 "	9/7	"												3		
"	3 "	9/8	"												3		
"	4 "	9/10	"												3		
"	5 "	9/11	"												4		
"	6 "		"														
"	7 "	9/12	"							Clockcard Sunday					19		
"	8 "	9/13	"												4		
"	8 "	9/13	"												1		
"	8 "	9/13	"												3 $\frac{3}{4}$		
"	9 "	9/14	"												2		
"	10 "	9/15	"												2		
"	11 "	9/16	"												3		
"	11 "	9/16	"												3		
"	12 "	9/18	"												2		
"	13 "	9/20	"												3		
"	14 "	9/23	"												3		
and	1 S. Hayland	8/30	221								3						
"	2 "	9/7	"								3						
"	3 "	9/8	"								3						
"	4 "	9/10	"								3						
"	5 "	9/11	"								4						
"	6 "		"														
"	7 "	9/12	"							Sunday	19						
"	8 "	9/13	"								4						
"	8 "	9/13	"								1						
"	8 "	9/13	"								3 $\frac{3}{4}$						
"	9 "	9/14	"								2						
Total forward				2842 $\frac{1}{2}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	656	181 $\frac{1}{2}$	284		45 $\frac{3}{4}$		77 $\frac{3}{4}$		61 $\frac{3}{4}$	63 $\frac{1}{2}$	51 $\frac{3}{4}$

Sheet No. 41

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by											
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator
Brought forward				2842 $\frac{1}{2}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	656	181 $\frac{1}{2}$	284	45 $\frac{3}{4}$	77 $\frac{3}{4}$		61 $\frac{3}{4}$	63 $\frac{1}{2}$	51
Montgomery 2	P Montgomery	9/12	204					Sunday		2					
"	2	"	9/12	"				"		4					
"	3	"	9/13	"						2					
"	4	"	9/14	"						1 $\frac{1}{2}$					
"	5	"	9/15	"						2					
"	6	"	9/16	"						1					
"	7	"	9/17	"						1 $\frac{1}{2}$					
"	7	"	9/17	"						1					
"	8	"	9/18	"						3					
"	8	"	9/18	"						2					
"	9	"	9/20	"						4					
"	10	"	9/21	"						1					
"	10	"	9/21	"						3					
"	11	"	9/23	"											
"	12	"		"				Clockcard							
"	13	"	8/28	"						1					
"	13	"	8/28	"											
"	14	"		"				Clockcard							
"	15	"	9/4	"						1					
"	16	"	9/7	"						1 $\frac{1}{2}$					
"	16	"	9/7	"						2					
"	17	"	9/8	"						1 $\frac{1}{2}$					
"	17	"	9/8	"						1					
"	18	"	9/10	"						$\frac{1}{4}$					
"	18	"	9/10	"						$\frac{1}{2}$					
"	18	"	9/10	"						3					
"	18	"	9/10	"						1 $\frac{1}{2}$					
"	19	"	9/11	"						1					
"	19	"	9/11	"						1 $\frac{1}{2}$					
Carried forward				2842 $\frac{1}{2}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	656	181 $\frac{1}{2}$	284	89 $\frac{3}{4}$	77 $\frac{3}{4}$		61 $\frac{3}{4}$	63 $\frac{1}{2}$	51

No. 3

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman
ught forward				2842 $\frac{1}{2}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	656	181 $\frac{1}{2}$	284	89 $\frac{3}{4}$	77 $\frac{3}{4}$		61 $\frac{3}{4}$	63 $\frac{1}{2}$	51 $\frac{3}{4}$	
land	10 S. Hayland	9/15	221							2						
"	11 "	9/16	"							3						
"	11 "	9/16	"							3						
"	12 "	9/18	"							2						
"	13 "	9/20	"							3						
"	14 "	9/23	"							3						
er	1 Carter	8/28	216										1			
"	2 "		"						Clockcard							
"	3 "	9/2	"										$\frac{1}{2}$			
"	4 "	9/4	"										1			
"	5 "	9/7	"										1 $\frac{1}{2}$			
"	5 "	9/7	"										3			
"	6 "	9/8	"										1 $\frac{1}{2}$			
"	6 "	9/8	"										1			
"	7 "	9/10	"										$\frac{1}{8}$			
"	7 "	9/10	"										$\frac{1}{8}$			
"	7 "	9/10	"										3			
"	7 "	9/10	"										1 $\frac{1}{2}$			
"	8 "	9/11	"										1			
"	8 "	9/11	"										1 $\frac{1}{2}$			
"	9 "								Clockcard							
"	10 "	9/12	"						Sunday				6			
"	11 "	9/13	"										2			
"	12 "	9/14	"										1 $\frac{1}{2}$			
"	13 "	9/15	"										2			
"	14 "	9/16	"										1			
"	15 "	9/17	"										1 $\frac{1}{2}$			
"	16 "	9/18	"										1			
"	16 "	9/18	"										3			
aled forward				2842 $\frac{1}{2}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	656	181 $\frac{1}{2}$	284	105 $\frac{3}{4}$	77 $\frac{3}{4}$	35 $\frac{1}{2}$	61 $\frac{3}{4}$	63 $\frac{1}{2}$	51 $\frac{3}{4}$	/—



Sheet No. 4

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman
I Brought forward				2842 $\frac{1}{2}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	656	181 $\frac{1}{2}$	284	105 $\frac{3}{4}$		77 $\frac{3}{4}$	35 $\frac{1}{2}$	61 $\frac{3}{4}$	63 $\frac{1}{2}$	51
Carter 17	S. Carter	9/20	216										2			
" 18	"	9/21	"										4			
" 18	"	9/21	"										1			
" 19	"	9/23	"										3			
F. Paoli 1	F. Paoli	9/2	176							1						
Bush 1	J. Bush	9/4	181							2						
" 3	"	9/17	"							3						
Ed. Corcoran 30	P. Larkin	8/28	209							2						
" 30	"	8/28	"							1						
" 30	"	9/13	"							1 $\frac{1}{2}$						
" 30	"	9/13	"							1						
" 30	"	9/13	"							$\frac{3}{4}$						
" 30	"	9/14	"							1						
" 30	"	9/14	"							$\frac{1}{2}$						
" 30	"	9/15	"							1						
" 30	"	9/16	"							$\frac{1}{4}$						
" 30	"	9/16	"							$\frac{1}{2}$						
" 30	"	9/17	"							1						
" 30	"	9/17	"							2						
" 30	"	9/18	"							1						
" 30	"	9/18	"							$\frac{1}{2}$						
" 30	"	"	"							1						
" 30	"	"	"							1 $\frac{1}{2}$						
" 30	"	"	"							$\frac{1}{2}$						
" 30	"	"	"							$\frac{1}{2}$						
" 30	"	9/20	"							1						
" 30	"	9/20	"							3						
" 30	"	9/20	"							$\frac{1}{4}$						
" 30	"	9/20	"							1 $\frac{1}{2}$						
Carried forward				2842 $\frac{1}{2}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	656	181 $\frac{1}{2}$	284	136 $\frac{1}{2}$		77 $\frac{3}{4}$	45 $\frac{1}{2}$	61 $\frac{3}{4}$	63 $\frac{1}{2}$	5

Set 5

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman
Right forward				2842 $\frac{1}{2}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	656	181 $\frac{1}{2}$	284	136 $\frac{1}{2}$		77 $\frac{3}{4}$	45 $\frac{1}{2}$	61 $\frac{3}{4}$	63 $\frac{1}{2}$	51 $\frac{3}{4}$
Dorcoran 30	P. Larkin	9/21	209							3 $\frac{1}{2}$						
" 30	"	9/21	"							1						
" 30	"	9/21	"							$\frac{3}{4}$						
" 30	"	9/22	"							1 $\frac{1}{2}$						
" 30	"	9/21	"							4						
" 30	"	9/22	"							$\frac{1}{2}$						
" 30	"	9/22	"							1 $\frac{1}{2}$						
" 30	"	9/23	"							3						
Mockel 1	H. Mockel	8/30	199							3						
" 2	"	9/7	"							3						
" 3	"	9/8	"							3						
" 4	"	9/19	"							3						
" 5	"	9/15	"							2						
" 6	"	9/11	"							4						
" 7	"	9/12	"							19						
" 8	"	9/13	"							4						
" 8	"	9/13	"							1						
" 8	"	9/13	"							3						
" 8	"	9/13	"							$\frac{3}{4}$						
" 9	"	9/14	"							2						
" 10	"	9/16	"							3						
" 10	"	9/16	"							3						
" 11	"	9/18	"							2						
" 12	"	9/21	"							3						
" 13	"	9/23	"							3						
ated forward				2842 $\frac{1}{2}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	656	181 $\frac{1}{2}$	284	214		77 $\frac{3}{4}$	45 $\frac{1}{2}$	61 $\frac{3}{4}$	63 $\frac{1}{2}$	51 $\frac{3}{4}$

Sheet No. 6

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman
Brought forward				2842 $\frac{1}{2}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	656	181 $\frac{1}{2}$	284	214		77 $\frac{3}{4}$	45 $\frac{1}{2}$	61 $\frac{3}{4}$	63 $\frac{1}{2}$	51 $\frac{1}{2}$
Corcoran	1 E. Corcoran	8/28	111										2			
"	1 "	8/28	"										1			
"	3 "	9/13	"										1 $\frac{1}{2}$			
"	3 "	9/13	"										1			
"	3 "	9/13	"										1 $\frac{3}{4}$			
"	2 "							Clockcard								
"	4 "	9/14	"										1			
"	4 "	9/14	"										$\frac{1}{2}$			
"	5 "	9/15	"										1			
"	6 "	9/16	"										$\frac{1}{2}$			
"	6 "	9/16	"										$\frac{1}{2}$			
"	7 "	9/17	"										1			
"	7 "	9/17	"										2			
"	8 "	9/18	"										1			
"	8 "	9/18	"										$\frac{1}{2}$			
"	8 "	9/18	"										1			
"	8 "	9/18	"										1 $\frac{1}{2}$			
"	" "	"	"										$\frac{1}{2}$			
"	" "	"	"										1 $\frac{1}{2}$			
"	9 "	9/20	"										1			
"	9 "	9/20	"										3			
"	9 "	9/20	"										1 $\frac{1}{2}$			
"	9 "	9/20	"										$\frac{1}{2}$			
"	10 "	9/21	"										3 $\frac{1}{2}$			
"	10 "	9/21	"										1			
"	11 "	9/21	"										1			
"	11 "	9/21	"					Night								
"	11 "	9/21	"					"								
"	11 "	9/21	"					"								
Carried forward				2842 $\frac{1}{2}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	656	181 $\frac{1}{2}$	284	214		77 $\frac{3}{4}$	81 $\frac{3}{4}$	61 $\frac{3}{4}$	63 $\frac{1}{2}$	51 $\frac{1}{2}$



et 7

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman
Night forward				2842 $\frac{1}{2}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	656	181 $\frac{1}{2}$	284	214		77 $\frac{3}{4}$	81 $\frac{3}{4}$	61 $\frac{3}{4}$	63 $\frac{1}{2}$	51 $\frac{1}{2}$
Corcoran 12	E. Corcoran	9/22	111										$\frac{1}{2}$			
" 12	"	9/22	"										1 $\frac{1}{2}$			
" 13	"	9/23	"										3			
" 14	"							Clockcard								
"	"							"								
" 15	Brindle C.	9/11	113										2			
" 16	"	9/2	"										2			
" 17	"	9/1	"										3			
" 18	"	8/31	"										1			
" 18	"	8/31	"										3			
" 19	"	8/30	"										3			
" 20	"	9/23	"										1			
" 21	"	9/21	"										2			
" 21	"	9/21	"										1			
" 21	"	9/21	"										1			
" 22	"	9/20	"										2			
" 22	"	9/20	"										$\frac{1}{2}$			
" 23	"	9/18	"										1			
" 23	"	9/18	"										1			
" 24	"	9/17	"										6			
" 25	"	9/15	"										4			
" 26	"	9/14	"										5			
" 26	"	9/14	"										$\frac{1}{4}$			
" 27	"	9/13	"										3			
" 27	"	9/13											2			
Nickerson 1	R. Nickerson	9/12	110					Sunday			4					
" 2	"	9/24	"								2					
" 3	"	9/11	"								1					
Montgomery 1	P. Montgomery	9/2	204							$\frac{1}{2}$						
Total forward				2842 $\frac{1}{2}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	656	181 $\frac{1}{2}$	284	214 $\frac{1}{2}$	7	77 $\frac{3}{4}$	130 $\frac{3}{4}$	61 $\frac{3}{4}$	63 $\frac{1}{2}$	51 $\frac{1}{2}$

Sheet No. 8

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman
Brought forward				2842 $\frac{1}{2}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	656	181 $\frac{1}{2}$	284	214 $\frac{1}{2}$	7	77 $\frac{3}{4}$	130 $\frac{3}{4}$	61 $\frac{3}{4}$	63 $\frac{1}{2}$	51 $\frac{1}{2}$
Vaccarezza, C 1	Do-	9/24	1				3									
Hayland	Hayland	9/2	207										2			
"	"	9/1	"										2			
"	"	8/31	"										2			
"	"	8/30	"										4			
"	"	8/28	"										3			
"	"	9/4	"										$\frac{1}{8}$			
"	"	9/4	"										1 $\frac{1}{2}$			
"	"	9/7	"										3			
"	"	9/7	"										2			
"	"	9/8	"										1			
"	"	9/8	"										2			
"	"	9/10	"										3			
"	"	9/10	"										1			
"	"	9/10	"										1 $\frac{1}{2}$			
"	"	9/11	"										$\frac{1}{8}$			
"	"	9/11	"										1			
"	"	9/11	"										3			
"	"	9/11	"										1)			
"	"	9/11	"										1)			
"	"	9/12	"										6			
"	"	9/22	"										2			
J. Domminick	Domminick	9/9	1				6									
J. Noleroth	J. Noleroth	9/20	"				4 $\frac{1}{2}$									
"	"	9/14	"				1									
"	"	9/14	"				4 $\frac{1}{2}$									
J. Perry	J. Perry	9/24	"				2									
"	"	9/12	"				4									
"	"	9/21	"				....									
"	"	9/14	"				....									
Carried forward				2842 $\frac{1}{2}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	681	181 $\frac{1}{2}$	284	214 $\frac{1}{2}$	7	77 $\frac{3}{4}$	173 $\frac{3}{4}$	61 $\frac{3}{4}$	63 $\frac{1}{2}$	51 $\frac{1}{2}$

et No. 9

Exhibit Number	Name of Employee	Date (month and day)	Workman's Shop No.	Number of hours worked by												
				Machinist	Machinist and machine	Large tool and machinist	Helpers	Blacksmith, fire and helper	Foreman	Iron worker	Rolls	Blacksmith with hammer	Punch, shear, counter- sink and planer	Bending slab and furnace	Crane and operator	Draftsman
Right forward				2842 $\frac{1}{2}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	681	181 $\frac{1}{2}$	284	214 $\frac{1}{2}$	7	77 $\frac{3}{4}$	173 $\frac{3}{4}$	61 $\frac{3}{4}$	63 $\frac{1}{2}$	51 $\frac{1}{2}$
Petrocelli	1 Petrocelli	9/14	180							4 $\frac{1}{2}$						
Perry	1 L. Perry	9/10	224							9						
Larson	1 P. Larson	8/30	209							4						
"	1 "	8/31	"							2						
"	1 "	9/1	"							2						
"	1 "	9/2	"							2						
"	1 "	9/4	"							$\frac{1}{4}$						
"	1 "	9/4	"							1 $\frac{1}{2}$						
"	1 "	9/7	"							3						
"	1 "	9/7	"							2						
"	1 "	9/8	"							1						
"	1 "	9/8	"							2						
"	1 "	9/10	"							3						
"	1 "	9/10	"							1						
"	1 "	9/10	"							1 $\frac{1}{2}$						
"	1 "	9/11	"							$\frac{1}{4}$						
"	1 "	9/11	"							1						
"	1 "	9/11	"							3						
"	1 "	9/12	"							1)						
"	1 "	9/12	"							1)						
"	1 "	9/12	"							6						
Tots				2842 $\frac{1}{2}$	1583 $\frac{1}{2}$	980 $\frac{1}{2}$	681	181 $\frac{1}{2}$	284	266	7	77 $\frac{3}{4}$	173 $\frac{3}{4}$	61 $\frac{3}{4}$	63 $\frac{1}{2}$	51 $\frac{1}{2}$
Machinist				2842 $\frac{1}{2}$												
Inst. & Mach.					1583 $\frac{1}{2}$											
Tool & Mach.						980 $\frac{1}{2}$										
Shr, plus 262, Page 60 5'							681	943	Total							
Blacksmith, Fire & Helper								181 $\frac{1}{2}$								
Foreman									284							
Ironworker										266						
Rolls											7					
Blacksmith, Fire & Helper												77 $\frac{3}{4}$				
Punch, Shear & Csk.													173 $\frac{3}{4}$			
Bending Slab														61 $\frac{3}{4}$		
Crane & Operator															63 $\frac{1}{2}$	
Draftsman																51 $\frac{1}{2}$



Power Schedule                      furnished Ship

Night Engineer		Power Hours and Straight & Overtime Allowed			
514					
8/24	W. Ferro	14½	"	11½	Hours
8/25	" "	15	"	6	"
8/26	" "	9	"		
		3	"	3	"
8/27	" "	7½	"	7½	"
8/28	" "	15	"	6	"
8/29	" "	14½	"	14½	"
8/30	" "	15	"	6	"
8/31	" "	7½	"	7½	"
9/1	" "	1½	"		
9/1	" "	6	"	6	"
9/2	" "	15	"	6	"
9/3	" "	4½	"		
"	" "	3	"	3	"
9/5	" "	18½	"	18½	"
9/6	" "	15	"	15	"
9/7	" "	15	"	6	"
9/8	" "	15	"	6	"
9/9	" "	15	"	15	"
9/10	" "	15	"	6	"
9/11	" "	15	"	6	"
9/12	" "	15	"	15	"
9/13	" "	15	"	6	"
9/14	" "	15	"	6	"
9/15	" "	15	"	6	"
9/16	" "	15	"	6	"
9/17	" "	15	"	6	"
9/18	" "	15	"	6	"
9/19	" "	15	"	15	"
Forwarded		359½ Hours		215½ Hours	

## Power Schedule

				Power Hours	and	Overtime Allowed		
Forward				359½	Hours		215½	Hours
Night Engineer								
9/20	514	W. Ferro		15	"		6	"
9/21	"	"	"	15	"		6	"
Day Engineer								
8/29	300	Chas. Linde		10	"		5	" Sunday
9/4	"	"	"	13	"		6½	" Night man absent
9/5	"	"	"	6	"		3	" Holiday
9/6	"	"	"	10	"		5	" "
9/9	"	"	"	10	"		5	" "
9/12	"	"	"	10	"		5	" Sunday
9/19	"	"	"	10	"		5	" "
On card of 9/19				23	"			

Steam furnished to steam out  
tanks previous to this date.

Total power time for power  
furnished ship nights 481½ Hours

## Sundays and Holidays

Overtime paid to Engineers on }  
nights, Sundays and Holidays } 262 Hours  
charged as helpers on shop time }

Sheet No. 1

## PUTZAR'S TIME SHEETS

Sheet No.	Machinists and Electricians	Riggers and Helpers	Foremen	Air Tools and Operator	Machinists and Air Tool	Carpenters	Steam-fitters	Steam-fitters Helpers	Iron Workers	Scalers and Laborers
Sheet 1	47	39								
" 2	145	114					26	12	40	
" 3	64	74	20							
" 4	132	182	10				8	10		
" 5	80	80	20							
" 6	165	239		15		1 da.	19	15		
" 7	84	70	16							
" 8									15	50
" 9	176	264	26	24			10	5	41	190
" 10	96	96	18							
" 11	221	196	10	44		$\frac{1}{2}$ da.	10	5	52	180
" 12	96	96	18							
" 13	348	338	20							
" 14	100	48								
" 15	164	216	12	40			3	6	21	
" 16			10	28					32	150
" 17	96	96	18							
" 18	153	198	10				8			
" 19			7	20					100	200
" 20	96	96	18							
" 21	130	245	18				3			
" 22			6	20					102	260
" 23	96	96	18							
" 24	129	226	10	7			12			
" 25			6	23					95	230
" 26	96	96	18							
" 27			8	60					158	230
" 28	131	316	10							
" 29	96	96	18							
Forward	2941	3717	345	19) 262)		$1\frac{1}{2}$ da.	99	53	656	1490



Set 2

Sheet No.	Machinists and Electricians	Riggers and Helpers	Foremen	Air Tools and Operator	Machinists and Air Tool	Carpenters	Steam-fitters'	Steam-fitters Helpers	Iron Workers	Scalers and Laborers
Forward	2941	3517	345	19) 262)		1½ da.	99	53	656	1490
Sheet 30	128	278	10							
31	96	96	18							
32			9	80					100	210
33	228	300								
34	130	156	28						80	
35			10							
36	282	292	20							
37	130	156	28							
38	205	216	10	3					43	
39	80	96	18							
40			13	52					221	200
41	258	244	14	3		1 da.			21	
42			15	27					281	
43									64	200
44	80	80	18							
45	424	414								
46	281	284				1 da.			3	
47		139	22							
48			10	40			13	0	164	240
49	96	80	18							
50	255	399	22			1 da.			26	
51	112	96	18							
52	500	594	4	2		3 da.		12	2	
53			25	48				20	220	
54	182	156	28							
55	262	288	20		20				42	
56			25	72			2		287	
57	79	126							5	340
Forward	6749	8007	748	19) 589)	20	7½ da.	114	91	2215	2680

Sheet No. 3

Sheet No.	Machinists and Electricians	Riggers and Helpers	Foremen	Air Tools and Operator	Machinists and Air Tool	Carpenters	Steam-fitters'	Steam-fitters Helpers	Iron Workers	Scalers and Laborers
Brot. Forward	6749	8007	748	19) 589)	20	7½ da.	114	91	2215	2680
Sheet 58	112	96	18							
" 59	204	387	20	14	26		5	5	28	
" 60	31	28	8	40					23	
" 61			6	15					216	
" 62	112	80	18							
" 63			8	45			2	2	188	200
" 64	305	257			17		10	5		
" 65	34	26	4	23			6	3	8	377
" 66			8	23					180	
" 66½	112	96	18							
" 67	132	164	20				23	14		200
" 68	114	12	7	76			3		131	
" 69	128	96	8							
" 70	126	186	20	50					33	
" 71	162	110	18	10					76	
" 72	56	28		12			22	10	96	
" 73	130	186	12							
" 74			9	12					194	
" 75	155	36	26	34			15	6	53	
" 76	218	153								
" 77	238	84		20					20	
" 78	182	52	36						105	
" 79	90	56	10	5					59	
" 80	197	47					67	40	9	
" 81	80	16								
" 82	88	14	11	34					275	
" 83	255	144					34		20	
" 84			34				22	22	290	
Forward	10010	10361	1067	1021	63	7½ da.	323	198	4219	8457

Sheet No. 4

Sheet No.	Machinists and Electricians	Riggers and Helpers	Foremen	Air Tools and Operator	Machinists and Air Tool	Carpenters	Steamfitters'	Steamfitters Helpers	Iron Workers	Scalers and Laborers
Forward	10010	10361	1067	1021	63	7½	323	198	4219	3457
et 85	190	89	20				26	16	40	
86	116	39	10						76	
87									40	
Machinists & Electricians	10316 hrs									
Riggers & Helpers		10489 hrs								
		Foremen	1097 hrs							
		Air Tool & Operator	1021 hrs							
			Machinist & Air Tool	63 hrs						
				Shipwrights	7½ da.					
					Steamfitters	349 hrs				
					Steamfitters' Helpers	214 hrs				
						Ironworker			4375 hrs	
									Scalers & Laborers	3457 hrs



**Summary of Pattern Makers' Material, Pattern Makers'  
Time and Pattern Makers' Metal.**

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**FRANCIS DOLAN—PATTERN MAKER.**

The first charge which we will consider is that at the end of page 3 of Schedule 1, which is as follows:

Pattern work .....\$324.10

The proof of this charge is found in Dolan's Exhibits, libelant's Exhibit 1, and the time cards found on the Shannon file marked "Francis Dolan's Exhibits 3, 4, 5 and 6". Libelant's Exhibit 1 shows the following lumber used for pattern work on this vessel:

Card letter and number

D 9040	25 feet
D 9041	108 "
D 9042	15 "
D 9045	15 "
D 9048	50 "
D 9053	30 "
D 9055	100 "
D 9058	25 "
D 9065	90 "
D 9066	50 "
D 9069	15 "
D 9070	25 "
D 9077	40 "

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Making a total of 592 feet

This is charged for at the rate of 6¢ per foot, which is testified to by Curtis, page 1472, as being the usual charge for such lumber.

592 feet at 6¢ per foot      \$35.52

The pattern makers' time is proven by Francis Dolan's Exhibits 3, 4, 5 and 6 and are as follows:

	date	shop no.	time-hrs.
Robert Shepard	8/30	392	2
“	9/3	“	4½
“	9/4	“	½
“	9/5	“	6
Francis Dolan	8/26	390	2½
“	8/27	“	8
“	8/28	“	5½
“	8/30	“	6½
“	8/31	“	4
“	9/1	“	3½
“	9/2	“	3
“	9/4	“	4½
“	9/6	“	1
“	9/8	“	2
“	9/10	“	2½
“	9/11	“	9
“	9/12	“	16
“	9/13	“	5
L. Reichhold	8/27	397	9
“	8/28	“	9
“	8/30	“	9
“	8/31	“	9
“	9/1	“	7

L. Reichhold	date	shop no.	time-hrs.
"	9/2	"	8
"	9/3	"	9
"	9/4	"	9
"	9/8	"	2½
"	9/10	"	9
"	9/11	"	5½
"	9/14	"	4
"	9/15	"	9
"	9/16	"	4
"	9/17	"	9
"	9/18	"	9
Francis Dolan	9/14	390	4½
"	9/15	"	4½
"	9/16	"	4½
"	9/17	"	4
"	9/18	"	7
"	9/20	"	1
E. L. Clifford	9/14	400	4½
"	9/16	"	5
"	9/17	"	9

---

Making a total of.....251 hours  
 charged for at the rate of \$1.15 per hour as testified to  
 by Mr. Curtis on page 1472, which testimony is undis-  
 puted.

This makes a total charge for pattern workers'

time of .....\$288.65

to which add the cost of redwood lumber as

above ..... 35.52

---

Making a grand total of.....\$324.17



The pattern makers casting materials is proven by libelant's Exhibit #2 which is the succession of white sheets, the detail of which is as follows:

Tag No.	Cast Iron	Cast Brass	Cast Bronze	Manganese Bronze
6235	1305		141	
6238		211½		
6240			161	
6256	69	141½		
6261	16			
6266		211½		
6271		67		
6272		51½		
6273		321½		
6274	105			
6276	530			
6280		251½		
6286	403			
6287	105	82	332	
6289		81½		
6290		41½		
6299	178	41½		
6294		251½		
6251				897
6257		2721½		
6298	15	5		
6301	215	93		
6303				
6304		311½		
6305		951½		

Tag No.	Cast Iron	Cast Brass	Cast Bronze	Manganese Bronze
6310		130		
6321	64			
6291			44	
6317	63			

Totals 3068

Cast Iron 3068#

Cast Brass 940 $\frac{1}{2}$ #

Cast Bronze 678#

Manganese Patch 897#

On the foregoing metal sheets the cast iron is indicated by the letters "C. I." Cast brass is either written out in full or indicated by the abbreviations "brs." or "M. B.", meaning machine brass. Cast bronze is indicated by either being written out or the abbreviation "B. R." Manganese bronze is written out.

These abbreviations and the nature of the material on each of the cards is indicated in the testimony of Dolan, pages 20, 21 and 22.

## APPENDIX II.

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### Miscellaneous Objections Appearing in the Brief (pages 118-122 and 127-132).

These objections are, with very few exceptions, unfounded. Many of them are simply an error in placing time in the column provided on the time sheet for straight time, instead of the column provided for overtime. The third column, however, which carries the total, is not affected thereby; the totals being the same in each instance as if the time mentioned had been in the overtime column. The total column is the one from which the bill is made up. So these slight errors have not in anywise affected the charge against Matson.

We will now take them up seriatim:

#### Reply to Appellant's Brief (pages 118 to 122).

(2) "*Sept. 14—W. Ross, Electrician, 12 hours charged against respondent.*"

This charge is cited to show that Putzar copied from the time card and nothing more. If that were true, he would have copied it correctly for the time card showed *seven* hours straight time and *four* hours overtime, or 15 hours in all. It is morally certain that the man himself would have seen to it that the total number of hours for which he was paid was correctly entered upon his card and hence his card must have shown 15 hours. If therefore this entry on Putzar's



sheets is any evidence upon the point to which it is cited, it is evidence that Putzar *did not copy the card*. The same observation applied to the next criticism on page 119. It will also be noted that both of these charges are *in favor of the respondent*.

No. (3) (page 119). Siverson 10 hours straight time and four hours overtime on rudder, and 9 hours straight time on valves. This is a simple error. The 9 hours last mentioned were put in the wrong column. The 9-hour entry on valves should have been in the total column.

No. (4) For this matter, appellant was allowed a reduction from the bill, but he does not appear to be satisfied with it. He thinks that it should have been sufficient to have caused the Court to entirely disregard Putzar's time sheets. If that were to be the course of reasoning, then no system of accounts could have been introduced in evidence, because all systems are subject to ordinary human error, and this is not an extraordinary mistake.

No. (5) As to Nelson working at night 14 hours overtime (sheet 78), and 10 hours straight time, and 4 hours overtime (on sheet 80): The conclusion drawn by appellant is wrong that this was "all performed in one night". Nelson worked 10 hours straight time at night, which is  $8\frac{1}{2}$  hours actually worked. He then remained at work during the day, which for him was overtime. He continued on the job for 18 hours longer, in other words, worked for  $26\frac{1}{2}$  consecutive hours. His overtime would be *day work* and night

work consecutively following, viz.: all the time of the succeeding day and night following his first  $8\frac{1}{2}$  hours straight time.

No (6) September 21st, P. McUrney. The explanation is, the man worked 10 hours on the 21st during the day, and worked for 13 hours that night, making a total of 23 hours. The mistake is made in entering the 10 hours in the first column or "straight" column, instead of "overtime" column. As respondent is only charged for what appears in the total column, and as the total is the same as if it had been entered under the right column, it makes no difference in the bill.

"J. Finson, No. 190, is allowed 4 hours straight time for work on floors (sheet 82) and 8 hours straight time for work on tank top and 10 hours straight time for work on try cocks (sheet 82). This gives an allowance to this man of 22 hours of straight work in one day."

The explanation is as follows: This man worked 10 hours straight time on that day and 6 hours overtime, which allowed him 12 hours overtime, and 10 hours straight time, or a total of 22 hours. The mistake is made in the entry of the overtime in the straight time column. Again, the total is constant.

William Eade, No. 212. The explanation to this is, that the man worked 10 hours straight time and 2 hours overtime, allowing him a total of 14 hours. The error is made in entering the 14 hours as straight time in the first column. Same as before.

"On August 28th, F. Paoli, No. 176, is allowed 18 hours straight time (sheet No. 11)."

The explanation of this is: This workman worked 10 hours straight time and 4 hours overtime, for which he was allowed 18 hours. The error is made in entering the 18 hours in the straight time column. Total is not affected.

"September 14th, William Schmidt, No. 318, is allowed 42 hours of time, composed of 10 hours straight time, and 16 hours overtime, reckoning  $8\frac{1}{2}$  hours of actual working straight time and adding to this 16 hours of overtime, gives him  $24\frac{1}{2}$  hours of actual work in one day (sheet 59)."

The explanation for this is that he worked a day of  $8\frac{1}{2}$  hours for which he was allowed 10 hours, and worked all night for 16 hours, for which he was allowed 32 hours. These added together make 42 hours. Appellant makes the mistake of not doubling the overtime.

"On the same day, workmen Nos. 355, 517 and 536 are allowed 10 hours straight time, and 15 hours overtime, making a total of  $23\frac{1}{2}$  hours of actual work (sheet 59)."

The explanation for this is, the workmen worked  $8\frac{1}{2}$  hours for the day, for which he received 10 hours, he worked all night a total of 15 hours for which he received 30 hours. There is nothing "incredible" about it. There are times when men have worked as much as 48 hours actual time (pages 1572-3).



Nos. 330, 515, 269 (sheet 64);

September 20th, 364 (sheets 74 and 80);

September 13th, 515, 564, 355 (sheet 55), worked in a similar manner.

“On Sunday, September 12th, C. Schmidt, No. 355 (sheet 52), is allowed 34 hours double time, which represents 17 hours of actual work, and, as will be seen from the above, this man worked  $23\frac{1}{2}$  hours September 13th and  $23\frac{1}{2}$  hours on September 14th.”

This work was performed while the ship was on the drydock having her rudder repaired and the tail shaft drawn, propeller removed and replaced. This was the boss rigger. He did work continuously, and nothing unusual.

“On September 20th (sheet 80), Henry Nelson, foreman, is allowed 10 hours of straight time, and 4 hours overtime, and on the same day at night, and is allowed 14 hours overtime, the total of  $26\frac{1}{2}$  hours of work in one day.”

The explanation is, that Nelson worked the day, and was allowed 10 hours straight time that night, and the next day 18 hours. Being night foreman, his day work is overtime.

“On September 20th, No. 516 is allowed 5 hours straight time, on job No. 5398, and 9 hours straight time on job 5295 (sheets 79 and 80).”

The explanation for this is, that this workman worked 10 hours for the day and 2 hours overtime, and was allowed a total of 14 hours. The error is made in

entering the time in the straight time column, but the total column is right.

“On September 20th, workmen Nos. 375, 570, 505, 567, 568, and 513, are allowed 10 hours straight time and 3 hours overtime (sheet 81) and in the night of the same day each man is allowed 13 hours overtime (sheet No. 78). This makes  $24\frac{1}{2}$  hours of actual work for each man.”

That is nothing unusual. The explanation for this is as follows: The men worked the day of  $8\frac{1}{2}$  hours of which they were allowed 10 hours, and worked 16 hours that night into the following day.

No. (7).

“On August 28th, workmen whose numbers are 105, 176, 181, 186 and 188 are allowed 50 hours of straight time for work on ladders (sheet No. 11).”

“On September 2nd, two workmen Nos. 105 and 109 allowed 8 hours of straight time on ladders (sheet No. 25).”

“On September 21st, workmen whose numbers are 189, 190, 203 and 205, are allowed 34 hours straight time and 14 hours overtime on work on floors (sheet 82).”

“On September 23rd, workman No. 109 is allowed 10 hours straight time on floor plates (sheet 85)”

“On September 24th, workmen whose numbers are 106, 184, 181, 127, 114, 186, 109 and 189, are allowed 40 hours of straight time for work on floors.

All of the above are improperly charged to the respondent, for the work is covered by a separate contract. (See Schedule 5 of the Libel, vol. I, page 37.)”

These changes are correct. It is not part of the contract, as we shall presently show.

The answer to all of the above testimony is as follows: the testimony shows it was extra work. "Klitgard" (page 2695), gives under head of "Work performed but not contracted for",

"Subd. 7. Floor plates and supports at back of engine reconstructed and renewed."

"Subd. 8. Floor plates over shaft raised and new angle bar supports fitted."

Also, Taylor, Vol. III, page 1085.

"Mr. Putzar, in charge of engine room after that work proceeded he might tear it all to pieces.

Q. Are you stating a hypothetical state of facts or facts?

A. Facts." (Page 1098, Vol. III.)

"The engine room platform throughout was reconstructed. It was lowered from its original position and a continuous platform made from the ice machine room over to the storeroom; the hand rails around the engine were also all remodeled, and the different openings in the gratings were made different from the original. Some new pieces of gratings, of course, had to be made, and new hand rails, as well." (Siverson, pages 1098-99.)

"No. (8). Francis Dolan, foreman pattern maker, worked at the shop on August 27th, 28, and 31st; Sept. 1, 11, 12, 13, 14, 16, 17, and 18th. He kept his own time, while there, and the time of the men working with him in his department. His cards and the cards of these men were turned in as shop cards, and have been introduced in evidence as such."

The explanation of this is as follows: Mr. Dolan's men are pattern makers, and in making their patterns, it was necessary to go aboard the ship *at short inter-*



*vals*, to fit the template. The major portion of their work was in the shop, making the patterns, and for that reason they have always been considered "shop men" and their record kept solely in the shop (Vol. I, pages 176-7).

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### Reply to Appellant's Brief (pages 127 to 132).

1. "*On Schedule No. 1 is a charge of 1145 lbs. of checkered floor plate, this is a part of the contract No. 4.*" It is not contract. See report of Klitgard VII, page 2695, subd. 7, under heading "Not contracted for", "floor plates and supports back of engine reconstructed and renewed" subd. 8, "floor plates over shaft raised and new angle bar supports fitted."

Siverson, page 1098, Vol. III, quoted ante.

Taylor's testimony, Vol. III, page 1085, also quoted ante.

*"Hilonian's reverse shaft was never in the shop."*

The following shows that work was done on it in the shop:

Klitgard, page 2690, VII, Subd. 22:

"To throttle, passover, *reversing* and drain rods overhauled, holes being bored out, new pins supplied and all satisfactorily refitted."

Testimony of Gray, page 2383, Vol. VII:

"Q. Mr. Gray, do you know whether or not any part of the reversing shaft was taken to the shop to work on? Mr. Klitgard was asked, 'Q. Do you know whether or not the Hilonian's

reverse shaft was ever in the shop of the United Engineering Works?’

A. Well, it was not, never was in the shop.

Q. He says it was not. Was any part of it in the shop? A. They made a clamp for it.”

*New valves for feed pump.*

Answer in VII, page 2692, Subd. 45:

“New bonnet plate with yoke, extension handle, stem, fitted with universal joint attachment, supplied and fitted for main injection valve.”

Also Subd. 42:

“Engine room tank manifold removed to shop, bored out new brass sheets and valve disks cast and fitted.”

*Hilonian bed plates were not in the shop of the United.*

We made a bronze patch in the shop that was fitted to the bed plates in place of the column. This is not disputed.

*Cylinder liner work.*

This could apply to the bronze liners for the eccentric straps or the fitting of the lagging on the reverse cylinder.

*Cover for slide valve.*

Testimony of H. B. Gray, Vol. VII, page 2390:

“A. Yes, there was work done on it.

Q. What was it? A. The rearrangement of the spring that holds the valve up to the seat spring and block?

Q. What was done?

A. Well, the block was worn out, not sufficient tension on the spring to hold the block up to the seat, to hold the valve in turn against the seat of it, and the spring was taken to the shop and a new block was fit on it.

Q. What did that necessitate with regard to the slide valve cover?

A. Well, it had to be planed."

*No taps were ever tempered in the shop.*

"It was the customary charge at that time to charge for all special tools for any vessel, and the people who undertook to have the work performed always paid for it, and in cases where we sent out handtools, the dressing and the repairing of these were charged to the job as was customary, owing to the fact that the tools were in good condition when sent out on the job and when the vessel left the tools were repaired under our own job numbers or cost numbers" (Curtis, 1472).

*On August 27th, (Adamson's exhibit 94), William Schmidt (No. 318), card charges respondent with 6 hours overtime under job No. 5295 on board Hilonian. The card also shows the full straight time was worked for 5253, which is not a Hilonian number.*

The answer to this is as follows:

Adamson's exhibit No. 94, August 27th, is not charged for as shop time (see Appendix I, sheet 20). The straight time worked on 5253 is not a Hilonian number and *not charged to them*. Overtime is always charged on last job worked on after doing straight time. (II, 342-3.)



*On Sheet 9, Mr. Putzar's sheet, the Hilonian is charged with 7 hours straight time on the ship for the same man. This is simply entered in wrong column and should have been overtime. The total column is right.*

*W. B. Thomas, No. 315, worked in the shop August 27th, job 5295 for 9½ hours straight time (Adamson's exhibit No. 55) and on the ship on the same day and on the same job number 10 hours straight time. (Sheet 9.) On August 28th the same man's card, (Adamson's No. 55), shows 10 hours shop work charged to 5295, while Putzar's time sheets credit him with 10 hours ship work on the same job number on the same day, both credits being for straight time.*

*W. B. Thomas, No. 315, is not charged for on the shop time' (see Appendix I, Sheet 15), but is charged for on sheet 9 as 10 hours straight time.*

*On August 28th the same man's card, Adamson's exhibit No. 55, shows 10 hours shop work charged to 5295, while Putzar's time sheets credit him with 10 hours ship work on the same job on the same day, both credits being for straight time. This is correct. He is not charged in the shop time for this man's labor (see Sheet 15, Appendix I).*

*September 15, John Ross, No. 348, is credited with 1½ hours straight time shop work under 5325, Adamson's exhibit No. 69, and on the same day is credited with 10 hours straight time and 2 hours overtime on the ship. This is correct. He is charged on*

Appendix I, Sheet 17, with  $11\frac{1}{2}$  hours and also charged for the time called for on Putzar's sheets.

*On September 16th James B. Gordon is credited with  $8\frac{1}{2}$  hours of straight time and  $1\frac{3}{4}$  hours of overtime shop work for work on pump links under job 5398, Adamson's exhibit No. 82, and on the same day with 5 hours straight time for ship work on the rudder, Putzar's sheet 67.*

The explanation for this is that Mr. Gordon worked  $8\frac{1}{2}$  hours of straight time and  $1\frac{3}{4}$  hours of overtime in the shop and was then called upon to work aboard the ship for 5 hours. The 5 hours is overtime. Mistake in column. Result unaffected.

*On August 28th, F. Paoli. The workman worked 10 hours straight time and 4 hours overtime, making a total of 18 hours including his overtime. Wrong column. Result unaffected.*

*September 8, J. Hurly, foreman, is credited with 10 hours straight time on tank top and 5 hours straight on smoke stack. Putzar Sheet 42. The explanation of that is that the man worked  $8\frac{1}{2}$  hours day work for which he received 10 hours, and  $2\frac{1}{2}$  hours overtime for which he received 5 hours, making a total of 15 hours. Wrong column. Result unaffected.*

*On September 20th Henry Nelson, night foreman, is credited with 10 hours straight time and 4 hours overtime on stuffing box gland and 14 hours overtime on*

*drag link brasses.* This is correct. Mr. Nelson received 10 hours straight for his day's labor and he worked that night into the following morning 18 hours. Putzar's sheet 78, 80.

*Schedules 1, \$720 for running power house at night 480 hours at \$1.50 an hour.*

Appellant offers a criticism of this charge which he says the trial Court said was answered by Ferro's testimony. Appellant says he does not understand this and desires us to explain it. The answer is plain. Appellant assumes that because Putzar's time sheets only show night work on the ship for twenty-four days that therefore the furnishing of the light to the ship for what he calculates to be thirty and 9/10 days is an overcharge. He *ignores the fact that light is furnished to the ship not because it is night time, but because the hold of the ship is dark both night and day* and therefore whenever they worked in the hold whether it be day or night, light must be furnished therefor. After the night shift had gone off a new shift took its place. They also worked six Sundays and holidays. If the Court will consult the summation at the end of Appendix I, it will find the "Power Schedule" which consists of Ferro's time and Linde's time, the day and night engineers. The time is 481½ hours.

*David Doig's Cards.* It is said these are in the record without any proof whatsoever. In making this statement he overlooks the fact that Doig testifies to that personally (pages 1005-6).



It is also pointed out that he was a shop man and allowed ten hours of straight time. This is correct, because he was foreman.

*The card of John Knight:* This man was dead, and Curtis testified that he saw him make out the time, the man was unable to write anything owing to the fact that his arm was in no condition to write.

*The card of Haglund, et al.:* These were proved by proving their handwriting. In answer to respondent's question: "Has counsel the temerity to claim that the hours shown on these cards have been legally proved, etc.?" we answer "Yes, he has that temerity for this man was crazy and the rest out of the jurisdiction."

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### **Respondent's Brief, pages 58 to 70.**

*Brief, pages 58-59.—Comment upon the difference between the original bill and the rechecking made by Curtis after the evidence was in.*

His comment upon this subject does not correctly state the facts according to the evidence. The difference is due to the fact that certain cards which were properly chargeable and included in the bill were not in such shape as to comply with the requirements of technical proof and were therefor not offered in evidence. This naturally made a difference in the totals. See pages 1482-1488.

*The finishing of the bearings (page 59).*

It is said that Gray's explanation that the contract called for rough finishing is contradicted by his bill

which reads "Cast and finished four new bearings for main journals." This is no contradiction for the finish there referred to is the rough finish. After they are cast they must be rough finished and the finer finish is done after the crank shaft is taken out.

Gray, pages 2386, 2450-2451.

This testimony of Mr. Gray is further corroborated by the specification Respondent's Exhibit Christy "C", Subd. 9, (page 2656) which provides for the "truing up of all main bearings in the lathe. File housings where worn and bed to same new shells (these will be supplied by ship). After shells are properly bedded they are to be bored out in place in perfect alignment". This shows that the finishing of the shells, otherwise called bearings, was not understood by Matson to be part of the special contract to make the same.

They were not, however, bored out in place as provided by the specifications, but they were finished in the shop.

Gray, 2386.

Siverson, 1158-9.

If the finishing of these bearings was part of a special contract why was that work placed in these specifications which were submitted to the Union Iron Works and the Risdon without a provision that that particular work was already contracted for and was to be done by the United?

The range of time from August 24th to September 20th is easily accounted for. The vessel was stripped

the 23rd, on the 24th they would try the bearings for their place to ascertain what was necessary to be done on them. The work on them would not be concluded until the engine was being reassembled.

The testimony of Kinsman and Klitgard that the boring out in place was ship work and not shop work is of no value because, as we have already seen it was not done on the ship as contemplated by No. 9 of the specifications, but was done in the shop. Both Kinsman and Klitgard's statement that no work was *required* to be done in the shop *under that specification* is therefor immaterial.

It is pointed out that the work, with but one exception, was done under 5295 and as that was the original specification work, it is asked why was not the finishing given an extra job number. The answer is, the boring out was called for by the specification, subd. 9. In making this contention respondent is guilty of giving a double meaning to the word "extra". It is not contended that it was an "extra" under the previous contract covered by Schedule 8. The specification contract is all *quantum meruit* work.

Regarding cards of Chandler and other men on spring bearing and stock cards charging material for spring bearing and shop work on spring bearings. Respondent asks a number of "Why do we find" under this heading and thinks Curtis will have to explain further.

We are always willing to explain if given a fair chance. Chandler's charge for babbitting is explained



by the testimony of Siverson, page 1091. The babbitting upon these bearings had to be done over again. Siverson said after explaining the manner in which the work was lost:

“A. It was lost inasmuch as they had to be *remetalled*, all the metal was melted out of them.”

This, as we have already explained, was not contract work. This explains the time cards of all the men showing work on spring bearings. It also explains the stock card charge of materials to these spring bearings: Respondent is charged for ship time on spring bearings because the shortening of the shaft made it necessary to move the spring bearings forward and slot holes in the pedestals.

Siverson, 1098.

*Chandler's two numbers on spring bearings 5295, 5325.*

This change has no effect on the *quantum meruit* claim. It is merely raised to call attention to respondent's claim of an error in keeping the job numbers separate. When Chandler's was examined, his attention was not called to this particular card, but his attention was called to another card, Sept. 5th, which is No. 5295 for crank brasses and Sept. 6th 5325 for crank pin brasses and asked to explain why they are separate numbers, says:

“It is too long ago for me to remember that now. No, I cannot explain that now” (pages 1421-1423).

But the change was made on the card of September 6th in *red ink*, showing that it was made in the office when the same was being checked up (pages 1424-1425). This shows unmistakably that it was inquired into at the time and therefor was right. The card of September 22nd shows the same condition. 5295 being corrected in *red ink*, it must have been right at the time or that would not have been done. Instead, therefor, of showing a lax method of doing the business, this instance shows to the contrary that it was carefully checked. Adamson is asked concerning it and while he is not able to remember what caused it, he gives the reason for it that is in perfect accord with the general method of keeping such time (pages 294-295).

*Smoke stack charges No. 5389, and smoke stack work No. 5360, all of which is said to have been done under contract.*

We have answered this claim on "smoke stack", all being done under contract in another part of the brief. So far as the changes in number is concerned it is answered by the same fact, namely, the \$900 work was done under No. 5389, but the other work for which we make *quantum meruit* charges was done under 5360 and consisted of the matters referred to when we considered the criticisms of Putzar's sheets 42, 48 and 72 as being a charge for *quantum meruit* work, which respondent claims was contract.

*Brief, pages 64 and 65.*—This is a claim that the cards under the *quantum meruit* claim were for contract work. This has been taken up and answered on page .

The rest of respondent's criticisms are mere repetitions of former ones that have been answered. By multiplying instances he says it is to be understood "that it is useless to go on, the whole method and plan was wrong and it is hopeless to bring order out of chaos of such proof". To make criticisms is one thing and making just criticisms is still another and by repeating criticisms in this way that are all of the same kind and have been fully answered under other heads does not tend to show hopeless or any error. We agree with him "it is useless to go on", because he does not affect anything.

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### **Answer to Criticisms Contained in Respondent's Brief, Appendix I.**

We think we have fully covered in our brief the point required to answer this criticism, but lest it be thought that because we have not specifically mentioned the appendix in that connection, we have not answered it, we herewith append reference to that part of the testimony which will be a complete answer thereto, namely:

- Curtis, Vol. V, 1550;
- Curtis, Vol. V, 1588;
- Curtis, Vol. V, 1597;
- Curtis, Vol. V, 1624;
- Curtis, Vol. V, 1625;
- Heyneman, Vol. VI, 2039;
- Adamson, Vol. I, 347;



Gray, Vol. VII, 2386;  
Gray, Vol. VII, 2366;  
Klitgard, Vol. VI, 1928;  
Siverson, Vol. IV, 1123.

The foregoing references to the testimony will show conclusively that the same thing is called by different names by the different men and sometimes by the same man. The names contained in the description are not the controlling element in the card but the job numbers are.

We have been unable to give as much time as we would desire to this detail, but consider that we have covered it enough to reach the purpose. Respondent makes the suggestions solely to give the impression that the system is "chaotic", and we have shown that as a rule his alleged errors were not errors at all, but only evidence of his unfairness. Had he consented to check up with us when the matter was fresh, the entire matter would have been plain, but honest inquiry was not his purpose.

NATHAN H. FRANK,  
IRVING H. FRANK.







No. 2251

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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MATSON NAVIGATION COMPANY

(a corporation),

*Appellant,*

vs.

UNITED ENGINEERING WORKS

(a corporation),

*Appellee.*

## REPLY BRIEF FOR APPELLANT.

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### "Facts of the Case."

(Appellee's Brief, pp. 1-17.)

Counsel prefaces this heading by saying that against appellant's claim "*their exists a presumption arising from the findings of the District Court*". In our opening brief we had not deemed it appropriate to make more than necessary references to the trial court's connection with this case. Frequent unnecessary references, however, to the matter in appellee's brief, as well as references to it in oral argument, force us

to take notice that we may correct counsel's pretended conception of the law relative thereto. This court has frequently recognized the principle that in admiralty cases, unless the trial court had advantages not possessed by the appellate court, its findings of fact raise no presumption one way or another, the appeal under such circumstances being practically a trial de novo. The principle has received, we believe, the approval of all courts reviewing admiralty appeals, and has but recently been re-enunciated in *Hamburg-Amerikanische Packetfahrt A. G. v. Gye*, 207 Fed. 247, 253, where it is said:

“While we recognize the rule that the findings of fact in admiralty causes by the district court are entitled to great weight by the appellate court, the reason for the rule is based upon the trial court's opportunity for judging the credibility of the witnesses; the reason for the rule ceases, however, when the trial court's finding is based, as it was in the present case, on depositions.”

The frequent references to these “presumptions” made by one of counsel's known experience in admiralty practice must be looked upon with no little surprise.

In replying to appellee's discussion of the “*facts of the case*” our purpose is to be brief as shall be consistent with a complete reply for, while there are few, if any, points under this head of any great materiality, still, the aggregate of statements of comparative unimportance seems to warrant the expenditure of the time necessary to correct them so that they may conform more fairly to the record.

### Charges of Collusion and Fraud.

Assertions are frequently made that our defense rests upon charges of "*collusion and fraud*" (see inter alia, pp. 2, 3, 16 and 22 of brief). The only warrant for them arises out of our discussion of the duplicated one hundred hours of time on smokestack work shown on Putzar's sheet No. 42. Of this duplication we say:

*"If Curtis, with knowledge of the smokestack agreement embodied in Schedule 9 of the libel, passed the smokestack time cards over to Putzar, and Putzar with the same knowledge approved of them as an appropriate charge to be made against the Matson Navigation Co., in addition to the smokestack charges embodied in Schedule 9, then, we have nothing to say to such a fraudulent collusion."*

We submit that these words are appropriately couched and need no defense. If there be "*charges*" of fraud and collusion, other than this hypothetical one, they do not find expression in any words of ours and, therefore, are born of inferences drawn by counsel from our statement of the facts. We do not ask the court to follow counsel in these inferences for, in our view, appellant's case stands in no such need.

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### Captain Matson Arbitrary and Impetuous.

(Brief, pp. 3, 7.)

It seems appropriate when the character of one's client is improperly and falsely reputed in a quasi public document, such as a printed brief, that, irre-



spective of his position in public life, such false reputé should be appropriately denied. In this case it was beside the issue for the statements to have been made and, even at the risk of incurring displeasure in discussing an immaterial issue, we feel drawn to do so out of respect for the truth if nothing more. First let us repeat the statements:

At p. 3 we find:

“Nor in what follows do we desire to cast reflection upon Captain Matson, *who was always known to be arbitrary and impetuous*, but with whom nevertheless the United was able amicably to do business for so long a period of time.”

And again at p. 7:

“Mr. Gray, who it will appear, was as solicitous for Captain Matson’s interests as for his own, and knowing Captain Matson’s disposition (*which the parties admit is arbitrary and somewhat impetuous, as also appears from his manner of testifying*) was very much worried about the increased expense (Klitgaard VII, 2010) and desired to curtail it.”

The italicized portions of both these quotations are ours, and they not only fail of substantiation in the record, but are in themselves false and unfair. The only possible basis for these gratuitous remarks appears on the first page of Heynemann’s book of sketches (not printed) introduced as “Libelant’s Exhibit Heynemann No. 3”, where Mr. Heynemann, in purporting to set down a conversation had with Captain Matson’s counsel wrote: “Told him I was a shop man and rather sympathized with the U. E. Works and had found Mat-

son very arbitrary.” This is the only record matter to support the statement that Captain Matson “*was always known to be arbitrary and impetuous,*” and the further one that his disposition is *admitted by the parties to be “arbitrary and somewhat impetuous”* (see cross examination Heynemann, VI, 2183-2185). When the attempt is made to fortify this latter statement by an appeal to the witness’s manner of testifying, it should have been apparent that the proprieties were being grossly abused. In placing before this court a biased interpretation of a witness’s character, *as shown by his words under cross examination*, no counsel adds to his dignity, for such a course is usually resorted to in appeals to jurors where the manner of the witness in giving his testimony has been seen by all.

We will now briefly answer such further of appellee’s remaining “*facts of the case*” as we deem at this time necessary.

(a) The *unqualified* statement found in the opening sentence of the second paragraph on page 4, that the bids of August 2nd “*were again rejected by Captain Matson*”, finds no support except in the testimony of Mr. Gray. Both Matson and Saunders say the bid of the *United* of that date *was* accepted.

(b) The statement in the paragraph just referred to, to the effect that Matson proposed Putzar as time-keeper, is not in accord with the record. Putzar was unknown to Captain Matson, and Mr. Gray himself

admits that he suggested his name. On direct examination he is asked by his counsel if he had made any suggestion to Captain Matson as to who the time-keeper should be, and he replied that he suggested three men and, after naming two of them, Mr. McClanahan interrupted the examination by asking who the third was and the witness replied:

“Well, that was Putzar.”

(VII, 2346-2347.)

(c) At page 5 of the brief the statements are made that

*“the work had not progressed very far when it was ascertained that the specifications would not answer the purpose intended.”*

*“Repeatedly during the progress of the work along the line of a particular item of the specifications, after preparations had been made and the work had progressed along that line, and parts of the vessel torn out, that line of work had to be abandoned and other and different work substituted.”*

As to the first, that the specifications were found deficient, if counsel means that they were abandoned, we simply reply that there is not a word in the record to substantiate such a statement. Both Klitgaard and Kinsman testified that the specifications were followed all through, with the exception of the agreed compensation and substitution work, and appellee's own witness Siverson testified to the same effect:

Q. Now Mr. Siverson, you had these specifications with you right along as the work went on, didn't you?



A. I had a set of the specifications.

Q. And worked according to the specifications, did you not, in the particulars where the specifications were carried out?

A. Well, really the specifications were consulted—when any particular line of work came up that was called for by the specifications, Mr. Klitgaard and Mr. Putzar would be called and their opinion would be asked regarding so and so, in which manner they wanted it done.

Q. And it would be done in that way?

A. It would be done in that way.

(IV, 1117.)

While Mr. Gray, when asked if the specifications which were originally given to the workmen were retained until the job was finished, said:

A. They certainly would be until the job was finished.

Q. They worked under them?

A. Yes.

(VII, 2438.)

As to counsel's second statement relating to the abandonment of specification work after it had been once commenced, we confidently assume that in making reference to the testimony of "Siverson III, pages 1090-3", counsel has selected the strongest evidence which the record affords to support the statement. Therefore, an examination of this reference was sought by us with great interest, for not to our recollection had the record ever hinted at such a showing as contended for. In this part of Siverson's testimony we do find the witness making a *general* statement that would in a *general* way lend color to counsel's assertion,

but the only instance which he is able to or does cite as illustrative of the matter destroys entirely the value of his general statement, for the illustration is that of the spring bearings, reference to which was made in our opening brief (pp. 168-169), and will be again referred to later on in this reply brief.

We challenge counsel to point to a "*particular item*" of the specifications, or any part thereof, that the record shows was ever commenced and then "*abandoned and other and different work substituted*". Of course, the court recognizes the difficulty of meeting a sweeping assertion, such as is here made, other than by a general denial. In all fairness if there be in the record any support for the statement it should be specifically pointed out. Reference to Siverson's testimony does not meet the required proof.

(d) At the top of page 6 it is asserted that the contention of appellant is that it was to receive a credit from the upset price of the contract if the crankshaft was not removed, and that *this contention is denied by the United*. As the testimony of all who participated in the crankshaft controversy is in perfect accord on this subject of a credit in case of its non-removal, we cannot understand counsel's reference to this as one of the disputed points of the case, except on the ground of forgetfulness of Mr. Gray's testimony on the point which we refer to in our opening brief on at least two occasions (pp. 141, 175). Surely it cannot be said that counsel's effort to nullify the effect of this testimony of Gray's (see opening brief,

pp. 147-148) is warrant for the present assertion of a difference of contention between the parties on the point.

(e) At page 6 is cited, as an analogy to appellee's contention as to the treatment of the bid of August 2nd, Captain Matson's rejection of Gray's bid on the tank top work. In the first place, if the larger specification repair work was being done on a quantum meruit, as contended for by the appellee, it certainly is significant in refutation of such contention that Matson should have called for a bid on this comparatively smaller work. Such a situation could fairly be likened to the incongruous case of a man authorizing his builder to make extensive repairs to his house on a time and material basis, and then, during the work, seeking from him a contract at a fixed figure for repairs to his cellar door. The truth of the matter is that, in all cases of consequence, coming under Captain Matson's observation, he invariably required from the United a fixed price for the work, and the tank top was no exception aside from the fact that he rejected the bid of \$1250, and preferred to run his chances on a time and material basis (Klitgaard, VI, 1947). The record shows that practically all dealings with the United in the matter of the "Hilonian" repair work was the subject of a special contract at a fixed price. Note the separate minor contracts covered by Schedules 4 to 10 of the libel (Klitgaard, VI, 1939-1945), and also the three prior contracts: Re-tubing the donkey boiler; installing an independent circulating pump, and the



work done on the Howden force draft system (id. VI, 1945-1946).

Referring specially to the contract covering the five spring bearings (Schedule 4 of the libel), it will be remembered that the original specifications contained this provision:

*“Should spring bearings require remetalling a separate price will be allowed for each.”*

(Christy's Exhibit C, VII, 2656.)

They did require remetalling and, in accordance with this provision of the specifications, a separate price was agreed to between Gray and Klitgaard (Klitgaard, VI, 1939; Gray, VII, 2449), which was subsequently embodied in Schedule 4 of the libel. Why, may we ask, did the parties find it necessary to agree to a separate price for this work if the contract for the balance had been “*turned down*”, and the whole job was to be done on a time and material basis? This remetalling of these five spring bearings at a “*separate price*”, agreed to after the necessity for the remetalling became apparent, and during the progress of the specification work, is indisputably contemporaneous evidence in proof of the recognition by both parties that the specification work was being carried out under Captain Matson's acceptance of the bid of August 2nd. We can think of no other possible construction to place upon this act of the parties. It is as significantly destructive of Mr. Gray's contention that appellee's bid of August 2nd was “*turned down*” as anything well could be, and in this connection we wish to refer

to counsel's statement found under another head of his brief:

“The contract, therefore, under the specifications, as originally entered into, was to remetal *two* spring bearings, and it was afterwards changed by requiring remetalling of the other three that under the original agreement had been prepared for placement without remetalling.”

(Brief, p. 47.)

Will appellee favor the court with *specific* reference to that portion of the contract “*under the specifications as originally entered into*”, whereby the remetalling of but *two* of the spring bearings was called for? And will it also point to the testimony showing the subsequent change in this agreement whereby the remetalling of the *remaining three* was agreed to? In complying with this latter, appellee will appreciate the futility and inappropriateness of making reference to any but the testimony of Klitgaard and Gray, the men who made the spring bearing agreement subsequently to the contract under the specifications.

We do not wish to be understood as contending that no work on the “Hilonian” was done other than at agreed prices. Our experts show that over \$6000 worth was done, to which they arbitrarily added \$2000 as a bonus covering possible overtime and other unforeseen contingencies. But this was evidently work which was uncovered in the doing of the specification work and, although it amounted to considerable in the aggregate, it was comparatively insignificant in the detail (with the exception of the tank top work), and

we surmise it was not thought of sufficient importance as each item was discovered to call for a separate price. Furthermore, we suggest that it was this character of extra work that called for Gray's protest:

I told him (Klitgaard) that they were getting themselves into a hole, that they were not going to get out very easily. Matson was out of town at that time and they had better stop finding any more work on the ship. \* \* \* I told them that they had better stop finding any more work, that they would get into serious trouble with the owner of the ship.

(VII, 2381.)

These remarks of Gray also are more compatible with appellant's contention of a contract than appellee's that there was none, and it is well to suggest that the predicted trouble arose through appellee's refutation of its contract and not through the "finding (of) any more work" on the ship, for the new found work referred to was provided for *without protest* in the check for \$22,922.56 tendered the appellee before appellant's answer was filed.

(f) Next, counsel takes up the subject of appellant's tender on November 24, 1909 (V, 1631), of a check for \$15,500 (improperly stated in our opening brief as for "some \$20,000", p. 5), which included the original contract and "sundry bills" (V, 1751; Matson, V, 1741; Curtis, V, 1628-1631). The fact of this tender having been made to cover the contract for \$11,749, and its rejection, is undisputed. From this, then, there will be noted two important facts. First,



an insistence on the part of appellant of the existence of the contract of August 2nd, and second, a tender of the full amount called for by that contract as early as November 24, 1909. The last fact bears strongly on the question of appellee's right to <sup>interest</sup> ~~insist~~ on the contract price of \$11,749.

Before leaving this subject of tender, we are forced again to correct counsel in a statement of fact. It is said that this tender was a result of telegrams between Matson in the East and his San Francisco bookkeeper, and was made under Captain Matson's orders, "*though at the time he had not seen the bills nor did he know anything about the facts.*" We are unable to verify by the record this latter statement. Captain Matson was in the East at the time of the receipt of a telegram from Gregg, the secretary of the company, stating that he had made a check to the United covering the contract on the "Hilonian" and sundry other bills, which was refused unless shown to be on account (V, 1751). This surely would hardly authorize counsel's statement that "*at the time he had not seen the bills nor did he know anything about the facts.*"

(g) There is no need to consume any time over appellee's discussion of Putzar's time sheets and his "*hand book*" as found at pp. 8 to 10 of the brief, other than to remark the calm assurance with which counsel says that "Putzar's pocket book was a mere memorandum, and the exhibit referred to (the time sheets) was the permanent form into which *it was transferred.*" That Curtis's testimony should be referred to in sub-

stantiation of this statement adds nothing to its verity, for Curtis's lack of knowledge of the contents of Putzar's "hand book" has been fully shown in our opening brief (pp. 85-98).

(h) Counsel refers to appellant's refusal to check up appellee's bill both before and after suit, "*in order to place the court in possession of the attitude assumed by the respondent towards this dispute*", and also that "*the same disposition was disclosed in the statement of the pleadings*". Several pages are then consumed in an effort to point out the unfair and ungenerous conduct of appellant along these lines. As to the United's offer to check up the bill before suit, Curtis says this was an offer to check it "*for any clerical errors*" (V, 1531). As to the offer to check it up when the United "*started taking testimony*", we find such offer couched in these words:

*Now, if there is any portion of this bill that you are ready to concede, so that we can prove that which you contest, why, I would be very glad to cut down the entire examination.*

(I, 166.)

Counsel seemed at the time this remark was made to be oblivious of the fact that *we had already* admitted the minor contracts of the libel, Schedules 4 to 10, and as to Schedules 1, 2 and 3, had definitely and specifically made admission of all the work done by the "United" known to us (I, 64-71). It was quite natural therefore that appellee should be put to its proof of the material and labor charges under Schedule 1 claimed to have been furnished under a quantum meruit.

In view of the paramount issue in this case touching the question of a contract, can it be suggested now it would be possible, without waiving our entire claim, to admit the material and labor and its value as shown by Schedule 1, which according to our claim is compounded of quantum meruit and contract items? As we have shown, the segregation of this schedule was requested by us before suit and refused,—was it incumbent, then, upon appellant after suit to perform this duty for appellee? Counsel seems further unmindful of the fact that just so long as one party maintains and the other disclaims a contract there could have been no “*checking up*” that would have had a mutually beneficial result. Appellant, in admitting the rates of labor on appellee’s bill to be correct (IV, 1346, 1347), went as far as it possibly could and still preserve its contention as to the contract. It will also be remembered that we admitted the furnishing of the material set forth in Schedule 2 and the first part of Schedule 3 (IV, 1322), and the *value* of the material shown on these schedules (IV, 1329). The second part of Schedule 3 was an admitted duplication and was withdrawn by the appellee (IV, 1329, 1330).

(i) *The Hough incident.* We desire to say at the outset that, if the court should find that the record supports counsel’s charge that the appellant acting through Mr. Diericx subsidized Mr. Hough “*not to render any services to the libelant in case the libelant should apply to him*”, any words of disapproval of such conduct shall meet our hearty acquiescence, and furthermore, for any attorney practicing before this



or any court to lend himself, either actively or passively, to his client's conduct in securing the co-operation of a prospective witness by bribery (which is our understanding of counsel's meaning when he uses the word "subsidized"), stamps him as unfit both morally and ethically to pursue his profession. At the hearing we looked upon the matter as being on a par with the tactics of some practitioners in the handling of a jury trial where the incident, admittedly having no bearing on the merits of the case, is elucidated for the purpose of the effect on the mind of some possible man in the jury box. Had we known or suspected that it was going to be used in this case as the basis of a charge of a species of bribery, we certainly would have gone into the matter further by calling Mr. Diericx for substantiation of our understanding of Mr. Hough's retainer, an understanding hinted at in the following question put to the witness:

Q. Subsequent to this request to make the estimate and your declination of it, is it not a fact that Mr. Diericx gave you a retainer and by the payment of that retainer required your advice in special matters connected with this case not involving an estimate on the work necessary. In other words, did you not obligate yourself to be at the disposal of Mr. Diericx or the Matson Navigation Co. in certain matters that did not involve the making of an estimate in connection with this case?

(IV, 1378.)

Although Mr. Hough's immediate answer to this question was: "I do not think that is so", and again: "I do not think that was very clearly set forth, Mr.

McClanahan", still, we submit that as the witness emphatically states that his understanding of the matter was that the retainer was given to secure his "*neutrality*" or "*hands off*" (IV, 1377, 1379), his subsequent admission that, if called upon by the Matson company to render an expert opinion on the use of the bending slab, or any similar proposition, he would have done so (id. 1379); greatly modifies his positive statement as to his remembrance or understanding of the reason for the retainer. In fact, his subsequent testimony clearly intimates that the suggested services might have been the purpose of the retainer:

Q. Did not Mr. Diericx mention to you the possibility of requiring your advice on certain matters that would not involve the estimate of the value of the work?

A. *He may have done so, if he had reminded me of that condition, and had come with a suggestion as you propose in regard to a bending slab, I would have done my best to give him an answer.*

(IV, 1380.)

Furthermore, our contention that Mr. Hough was not subsidized "*not to render any services to the libellant in case the libellant should apply to him*" finds additional support in this testimony:

Q. Going back again to the time when you received a retainer from the Matson Navigation Co., did you have a talk with any one besides Mr. Eva, subsequently connected with the United Engineering Works?

A. Yes, sir.

Q. With whom?

A. Mr. Curtis.

Q. What was the conversation and when was it?

A. Mr. Curtis called on me; it would be about ten days ago.

\* \* \* \* \*

Q. What did Mr. Curtis want with you?

A. He asked me if I would certify to the conditions of time as worked in this city for some time back in 1906 or 1907, from that time on.

Q. That is the labor conditions here?

A. Yes, sir.

Q. What did you say to that request?

A. I said I thought I could do that.

Q. What else was said?

A. That was all.

\* \* \* \* \*

Q. You made no protest to Mr. Curtis in the matter?

A. No, sir, not to Mr. Curtis.

Q. Yet you knew he was asking of you data to be used in this case?

A. I suspected so.

Q. And that data you have used in this case?

A. I have.

(IV, 1387, 1388.)

If Mr. Hough was bribed not to render any service to the appellee, then the joke is on the appellant for appellee used Hough, not only to establish the labor conditions under which the "Hilonian" work was performed, but also this witness furnished appellee affirmative proof of the value of the materials charged in Schedule 1 and, in anticipation of our use of expert testimony, he was used in anticipatory rebuttal to show the worthlessness of such evidence. Truly, counsel gives the appellant the name but he takes the game. But speaking seriously. How puerile this charge of subsidizing really is when one considers the futility or buying up *one* of a score or more of men of equal abil-



ity touching a matter so general, and where the merest embryo would know it to be impossible for the expert to remain bought because of the power of the process of this court. And lastly, *subsidizing* a man already determined, because of his friendship for both parties, to remain neutral anyway, is a misnomer.

Q. Your evidence, as I understand it, clearly shows that you did intend to be neutral before you got the retainer?

A. I have suggested that it was likely that had the United Engineering Works asked me to serve them it is likely that I would have excused myself.

\* \* \* \* \*

Q. And that neutrality and that frame of mind existed before you accepted a retainer from the Matson Navigation Co.?

A. Yes, sir, to a great extent. I felt friendly to both parties.

(IV, 1380-1381.)

Q. And if you felt that kindly feeling towards the United Engineering Works, why did you take a retainer from the other side?

A. As I said before, neutrality, that is my word.

Q. Why could you not preserve the neutrality without the retainer?

A. You have pointed out it is a matter of business with me and was.

(IV, 1411.)

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### Contract or Quantum Meruit.

(pp. 18-69.)

Appellee's reply brief under this head starts out with an admission of the correctness of the law cited

by us (opening brief, pp. 192-197), and a criticism of its application. The situation to which our cases are intended to apply can be viewed in a twofold aspect. In citing them we desired to show the situation where the original contract, calling for the removal of the crankshaft, was subsequently departed from by an oral agreement, with no mention made as to a credit on that account. In addition, we wished to show the situation where in performing the original contract, other work was subsequently mixed with it admittedly done without an agreement as to price.

As to the "*compensation*" work and work performed in a different way from that called for by the contract, but accomplishing the same purpose, we cite no law at all for the reason that we contend that these changes were mutually made without affecting the contract price of \$11,749, making the issue as to such work purely one of fact, for the law under such circumstances is too well known to require citation. In our pleadings we make no mention of this *compensation* and *substituted* work, deeming the matter solely a question of proof which we would have to make in the establishment of our claim of a contract. The "*omissions, changes and modifications*" from the contract, made without agreement as to price, referred to in our answer (I, 47), and made so much of throughout counsel's brief, refer solely to the crankshaft, as is made perfectly apparent by the succeeding allegation:

That the respondent is informed and believes, etc., that the just and reasonable value of the work and materials omitted as aforesaid by agreement

of the parties from the original contract as aforesaid is the sum of \$1398.25, and of the additional work and materials (not called for by the contract) furnished as aforesaid, the sum of \$8280.50.

(I, 48.)

Counsel's argument, therefore, on pp. 20 and 21, proceeds on a wrong hypothesis and, working along the line of this erroneous theory, we are told that our pleading "truly stated the facts with regard to those changes, but when he came to his proofs, he found it impossible to conform to the rule established by law and in order to '*force his balance*' (this seems to be a favorite expression of counsel) he advances the contention of substituted and compensation work." This statement, carrying as it does the charge (specifically repeated at p. 32 of the reply brief), that our contention of "compensation" work was a substituted afterthought, made *after the drawing of our answer*, is not supported by a single word of the record. Gardner and Heynemann gave to appellant their estimate of the value of the "Hilonian" work, and this estimate was used in preparing appellant's answer. Their work was based on the understanding of there having been an agreement covering this compensation and substituted work, entered into without affecting the price of the contract. Their entire testimony is based on this premise. Note the hypothetical statement of facts preceding the examination of both witnesses (Heynemann VI, 2019; Gardner VI, 2206); note Gardner's testimony (VI, 2215-2217) where he speaks of this compensation and substituted work and refers to the specifications, which



he had in his possession when estimating, showing it (Gardner's Exhibit 1, VII, 2662; VI, 2264, 2265); note that the testimony of both these witnesses pertaining to the 140 item list (Kinsman's Exhibit 2) recognized throughout this work which was not included in their estimate, because they were told it was compensation and substituted work under the contract; note that counsel himself admits this when he says:

"The experts made no allowance whatever for these changes, but as already stated, treated them as if agreed upon by the parties as substitutions without further compensation."

(pp. 22, 23.)

Furthermore, Klitgaard's report to the appellant, after the work was done and before thought of litigation, a copy of which was given to appellee, shows this compensation and substituted work (VII, 2700-2702), and bears out Klitgaard's and Saunders' testimony thereto.

With the record so clear on the point, that counsel should draw the inference he does and refer to our *forcing a balance* (by which we understand him to mean the substitution of fabricated proof), passes our understanding.

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### The Contract an Entirety.

(pp. 22-26.)

Under this head, in referring to the provision of the specifications that the work was "all to be in strict

accordance with the specifications", this gratuitous statement is made:

"The purpose of this provision is plain when we consult the specifications *which contain 15 items, most of which are interlocking work upon an engine.*"

In the first place, on its face, the provision referred to clearly shows it to have been inserted for the benefit of the appellant and not the appellee, and it applies severally and jointly, and not jointly alone, to the 15 items of the list. Secondly, not a single item of the specifications interlocks with another. In other words, any one of the 15 items might be omitted entirely without affecting the performance of the work on the remainder. This statement can be borne out by a simple reading of the items themselves. In fact, it would seem from an inspection of the list that this had been one of the objects sought to be accomplished by the drawer of it,—to make a segregation of the work into distinct and independent items, else why should they be numbered? When counsel, therefore, says that changes in the specifications would have destroyed the "*entirety*" he should have said destroyed the *contract*. For the court's benefit we epitomize the 15 items:

Item I. Work on air pump and condenser.

Item II. Work on L. P. engine.

Item III. Work on jacking worm wheel connected with main shaft.

Item IV. Work on H. P. and L. P. *guides* for water circulation.

Item V. Work on H. P. and L. P. *eccentric straps* (remetalling).

Item VI. Work on H. P. *cylinder*.

Item VII. Work on iron column to support H. P. cylinder.

Item VIII. Work on reaming bolt holes in No. 2 shaft coupling.

Item IX. Work on crankshaft and other shaft work and wheel.

Item X. Work on blow off cocks on skin of ship and sea cocks and valves.

Item XI. Work on valve chamber of circulating pump.

Item XII. Work on engine room tank tops.

Item XIII. Work on bulkhead of fore and aft peak tank tops.

Item XIV. Work on windlass and forecastle head.

Item XV. Ship docked, cleaned and painted.

(I, 52-56.)

As to the cases cited by counsel under this head, they hardly bear out his contention. Thus, in *Lincoln v. Schwartz*, 70 Ill. 137, the defendants, for whom the work was being done, refused to go on with the contract and, of course, they could not hold the plaintiff to the contract price. The court also remarked that it was not shown that, figuring from the contract, the price would be any more favorable to the defendants. In *Rhodes v. Clute*, 53 Pac. 990, the contract was entirely



departed from and a brick house built in place of a frame one. The case contains nothing in point as to the entirety of the contract. In *Pitcairn v. Philip Hiss Co.*, 113 Fed. 496, it is simply held that the particular contract had been *defectively* performed and that, therefore, there could be no recovery on the contract. If there had been a *substantial* performance, recovery would have been allowed, despite minor changes. In *Rounds v. Aiken Mfg. Co.*, 36 S. E. 722, the court held that a charge for *extra work* should be recovered on a quantum meruit. The case goes no further than this.

Counsel wholly ignores the cases cited by us which show that, in a proper case, even a lump sum contract may be followed although very important changes are made. To this effect are the cases of *Ry. Co. v. Snelling*, 59 Texas 116; *City Street Improvement Co. v. Kroh*, 158 Cal. 308, and *Goodwin v. McCormick*, 6 N. Y. Supp. 662. In the last case cited there were many variations from the contract made by consent, but plaintiff was able to detail the alterations and estimate the fair value of each deviation, and it was held that, as the contract could be traced and the extra work figured out, the latter only should be allowed for on a quantum meruit. The case is very short and very much in point.

If, however, there was a contract in the case at bar; if certain *substituted* methods of performing the work were agreed on (with or without extra allowances for the same) and if, at the time the contract was let, it was understood that a deduction should be made if the crankshaft came out, then all talk about the entirety or

non-entirety of the contract is immaterial and misleading. Under such circumstances the contract price would clearly apply to said work with a proper deduction for the crankshaft, which deduction, like the extra work done, should of course be figured on a quantum meruit.

But let us go even further and suppose that there was no agreement about the crankshaft. Is counsel to be allowed to claim that because a certain item was *omitted* his client can charge a *greater price* on that account? Can he say: "True it is that my client contracted to do work on 15 items for \$11,749, but one of those items was left out and, therefore, the contract is destroyed and I can charge more than \$11,749 for the other 14 items."? Such an argument refutes itself.

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### Value of Modifications Not Agreed On.

(pp. 26-48.)

Under this heading there are but few points which have not already been sufficiently covered or that require reply. Counsel's principal contention rests on the wording of our pleading which requires no further treatment. A new point, however, is raised to the effect that our answer in another particular is silent again in regard to what we conceive to be a matter of fact to be proven by us in our establishment of the contract. It is asserted that the answer is silent as to the extra challenge metal which Klitgaard says was agreed to be allowed in the compensation agreement under item 4 of the specifications. What of it? The

credit for this metal was given to appellee by our experts in their estimate of the value of the entire work. The court will remember that after the original estimate of April 29th, as a result of seeing the vessel in the drydock and conversations with Mr. Klitgaard, who had not been seen up to that time, Gardner and Heynemann reviewed and revised their estimate and, after making appropriate credits and debits to conform to their newly acquired information, they found the difference was so small they decided to make no change in the original figure (VI, 2268-2269). Mr. Gardner testified:

Yes, we had some conversations with Mr. Klitgaard who informed us that we had not been just in some cases to the United Engineering Works in the manner (matter) of not allowing them certain material, which he stated he had agreed should be paid for as an extra.

(VI, 2269.)

Item No. 131 of Kinsman's Exhibit No. 2, used by the experts in their examinations, was the item covering the compensation work under specification item No. 4 referred to at p. 28 of the reply brief. On being examined on this item No. 131 Mr. Gardner said:

We saw this work and considered it was covered by item No. 4 of the original specifications *as compensation work*, though at the present time I am inclined to think that we allowed the challenge metal as an extra.

(VI, 2265. See also pp. 2266, 2271-2272.)

Likewise, Mr. Heynemann, in referring to the same item, said:



No. 131, we considered that this item was partly covered—I will state that we saw these shoes and considered that the item was partly covered by item No. 4 of the general specifications *with the exception of the challenge metal for which we allowed for an extra.*

(VI, 2046.)

Again item No. 132 of Kinsman's Exhibit No. 2 was the item of appellee's billhead covering the compensation work under specification item No. 5, in which the only other credit was coming to the appellee. As to this item, too, the testimony is equally as clear:

We saw this work and considered that it was covered by item 5 of the original specifications, *as compensation work. This is another item that has been the subject of consideration since the estimate of April 29th*, and as this is compensation work, or rather although this is compensation work, and we could see no reason for allowing the bronze or challenge metal, we did allow for bronze and challenge metal owing to the fact that Mr. Klitgaard, I think it was, *stated that he had agreed to pay for the challenge metal in connection with this work also the bronze.*

(Gardner, VI, 2267.)

This evidence is not only strongly corroborative of Klitgaard's testimony and Saunders' relative to the *agreement* as to compensation and substitution work, but, if more were needed, it entirely demolishes counsel's reckless assertion of *absolute certainty* "*that respondent at the time its answer was drawn was preferring no contention that the changes and modifications of the specifications were to compensate one for the other.*" (brief, p. 32.)

The only other matter requiring answer under this head of appellee's brief is the reply made to our argument arising out of the fact that all this compensation work was given the original number 5295, whereas, if it had been considered an extra, it would have received a separate number (opening brief, pp. 169-173). Curtis's excuse for this, as pointed out in our brief as well as in appellee's, was that because of the number of changes being made he ordered a consolidation of all the work under one number—5295. Since writing our opening brief we have become convinced that our interpretation of Curtis's testimony on this point, as found on page 171, is incorrect. This witness's consolidation order, we now contend, was not one which affected the time and material card record *of the men*, but one which affected the final sheets of the *foremen* showing the completed work, from which sheets he, Curtis, compiled his bill-heading. He says:

I instructed the foreman of every department to use the numbers on the job collectively, and to note on their sheets the work as they actually performed it.

(IV, 1463.)

If this consolidation order was ever intended for more than this it was never carried out, for up to the very close of the job the time and material *cards* continued to show *different* quantum meruit job numbers which were never discarded until the billhead (Schedule 1) was prepared by Curtis.

Q. Now, Mr. Curtis, you have said that the labor and material found on Schedule 1 was furnished under certain numbers that you gave?

A. Yes, sir.

Q. That is correct is it?

A. Yes, sir.

Q. And that in making out Schedule 1 you discarded these numbers and consolidated all the work and material under that schedule without giving it a number?

A. I did not discard the numbers. I used those numbers collectively. I used that as a serial number for that and consolidated all the work done under these numbers in Schedule 1.

\* \* \* \* \*

Q. These several numbers which were consolidated in Schedule 1 *were placed on the lists of work to be performed by you, were they?*

A. They were, yes.

Q. And during the progress of the work the workmen placed these respective numbers on their time cards, did they not?

A. They did.

(V, 1587-1589.)

(And we may add, parenthetically, that from these time cards the charging part of its bill was compiled.)

From this evidence it will be seen that our charge that Curtis's order was "but one way of ordering the work to be mixed up" applies properly only to the lists of work and billheadings compiled therefrom.

A. These headings are the result of the consolidation of the reports of the work furnished by the different foremen of the different departments of our yard.

Q. What office do they perform as a record in the office of the United Engineering Works?

A. They are the original record. *It is the only record that we keep.*

(IV, 1428-1429.)



If we are right in this construction of Curtis's "consolidating" testimony, as applied to *compensation* and *substituted* work, then our question (misquoted by counsel, p. 44 of reply brief); "Why was it not then given a separate number?", still requires reply.

Counsel's *loss of time argument* (pp. 45, 46), does not apply to the compensation and substituted work, for such work was agreed to *before* it was commenced, while Siverson's illustration of loss of time on *spring bearings* has already received our notice.

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### Bid Was Not Accepted But Cost to Be Determined by Time and Material.

(pp. 48-69.)

#### *Crankshaft controversy.*

At the outset, under this head, we could answer counsel's argument from a legal standpoint in a way that would put an end to his entire contention on the subject for, *from a legal standpoint*, we could contend for a contract evidenced *solely* by the written specifications and bid of August 2nd (see answer, I, 47), that the parties at the time contemplated a possible modification, and *orally* agreed that in such eventuality an appropriate credit should be made, in no way affecting the legal status as embodied in the written instruments; that, though the contemplated modification became a reality, *through the consent of both parties*, it did not destroy the written contract as the

measure of the value of the unmodified remainder, provided it were possible to segregate, trace and value the modified work; that in the absence of *consent* either party could have enforced the written contract without modification; and that further, as a matter of law, the oral agreement as to the crankshaft was no more a part of the written contract than was the oral understanding that a timekeeper was to be employed. But, as counsel's brief is directly intended as a reply to ours, we will confine ourselves strictly to the matter as understood by the parties to the agreement, namely: to the contention that the written contract was *accepted*, with the proviso that an appropriate deduction should be made in case it was decided that the crankshaft need not come out.

The reason Klitgaard drew specifications requiring the shaft's removal, contrary to his judgment, is clearly set forth by Klitgaard (opening brief, p. 173), and counsel's statement that the question had not been discussed with the other bidders, the Union Iron Works or the Risdon Iron Works, is entirely gratuitous.

Appellee's discussion next passes to the matter of the change in the letter of April 29th, 1910 (pp. 52-59). As to this matter the evidence is uncontradicted that Mr. Diericx made a report to counsel at the time of his employment, and that in it appeared the proviso as it originally appeared in the April 29th letter, along with a further statement showing that the proviso referred to the possible non-removal of the crankshaft. The witness said that he had asked Mr. Gard-

ner if he had a copy of this report, who replied that he thought he had (McClanahan, VI, 2199). The proviso was changed in the letter of April 29th to read:

There was a benefit coming to the Matson Navigation Co. if it was decided not to take the crankshaft out of the ship.

We submit that this change agrees not only with Matson's testimony and Saunders', but absolutely with Gray's.

Q. What was the understanding about this undetermined matter of the taking of the crankshaft out?

A. Well, there was a timekeeper sent to the yards to look out for the job as a whole, and he was supposed to determine what the loss or what the saving would be.

Q. And if there was a saving the Matson people would get the credit for it?

A. Most assuredly they would have got the credit for it, that is what they put the timekeeper on the job for.

(VII, 2405-2406.)

Where Diericx got the peculiar phraseology of his report the record does not reveal. He had nothing to do with the letting of the contract,—in fact it was let months before he had any connection with appellant (I, 106-107).

Counsel would have it inferred that the crankshaft controversy (as well as the contention of compensation and substitution work), was evolved for the purpose of this suit. Our opening brief refers to evidence of



Gray corroborating that of Matson and Saunders, and shows clearly that the question of the shaft's removal or non-removal was of long standing.

Furthermore, what does counsel mean when he characterizes the original proviso as a memorandum of Captain Matson's and Saunders' recollection of the agreement "*made when it was yet clear in their minds and before the new contention was born*" (p. 59). This was a memorandum of neither of these men, and to make the positive assertion that, "*of course, Mr. Diericx could only have received the information contained in that proviso from Captain Matson or Captain Saunders or both*", is not warranted by the record, for Diericx had gone over the dispute with appellee (I, 103), while Captain Matson was in Honolulu (I, 105) and, if the original proviso "*is precisely the agreement*" to which Mr. Gray testified, the inference as to where Diericx got it is as properly drawn that he got it from someone connected with the appellee as from either Matson or Saunders.

The change in the letter of April 29th was made to conform to the proof which counsel then and always had. It was made for no ulterior purpose,—had there been such we presume that the proper course would have been to have instructed Gardner to have destroyed the original but, as the court will see, there was no attempt of any kind to suppress or hide what had been done. We believed our action was right and attempted, as the record shows, to convince counsel that there was no ulterior motive and thus save the

record. But counsel would not accept our explanation. The letter was obviously not changed for the purpose of putting the change in evidence. It was used by Mr. Heynemann in his direct examination simply to refresh his memory and, there being an error in it, there was certainly no objection to correcting that error, the document simply being for the private use of the witness. Counsel, however, saw fit to introduce it on the cross examination simply for the purpose of casting suspicion on the appellant and on his request the original letter was promptly produced. If appellant's counsel had suggested and the experts had made this change for the purpose of introducing the document in evidence, it would be a very different matter, but the changing of a document used as a mere assistant to the memory is hardly subject to the censure heaped upon such action. We could have further enlarged the record by putting Mr. Diericx on the stand, introducing his report and securing his explanation of it, but on second thought it seemed really an immaterial matter of no consequence as determinative of the issue involved, and so no further notice was taken of it except as is found in the brief references in McClanahan's testimony. At this time we find embarrassment in even undertaking a defense of the charge of ulterior motive, for we believe the circumstances are so clearly free of even suspicion of wrong that to defend lends dignity to the charge.

Counsel defends his failure to ask Gray with reference to the acceptance of the bid of August 2nd by call-

ing such evidence a "legal conclusion". He says he asked the witness: "for the conversations that passed between them and directed his attention to *the only material fact in dispute, namely, conversations* with respect to a reduction in the bid if the crankshaft did not come out of the vessel". The truth is that counsel deliberately confined the witness to that feature of the conversations. In answer to the question: "Now, at the time these bids were put in, did you have any conversation with Captain Matson?" Mr. Gray replied:

A. I certainly had conversations with him. Do you want me to detail it?

Q. I will come to it. Did you ever, etc.

(VII, 2346.)

Counsel, however, never did "*come to it*". To say that the question as to whether Gray said to Matson that if the crankshaft did not come out he would make a deduction of \$2000 in the bid was "*the only material fact in dispute*" is really amusing. We ask counsel, what about the materiality of the unqualified testimony of Matson and Saunders that the bid was accepted? However, if to Gray's testimony there has been given "*an added badge*" of verity, because of its being given under cross examination, then we appreciate to the full his admission to us respecting this "*only material fact in the case*": "Most assuredly they would have got the credit for it; that is what they put a timekeeper on the job for."

Counsel's apology for instructing the witness Gray not to answer the question: "You take the position



then that there was no contract with Captain Matson?" (VII, 2425), on the ground that it was a question of law and between the colloquial understanding and the legal understanding "none but lawyers distinguish", is begging the question. Mr. Gray knew the kind of contract which the question referred to, for the whole matter was introduced upon the gratuitous suggestion of the witness himself: "It was generally understood there was going to be a timekeeper on the job after he had come to the conclusion that they were *not going to let it out on a contract*—that was understood" (VII, 2407). This was the kind of contract (the "colloquial" kind), which the question was directed to, and both counsel and the witness must have known it, and to say that it was "unfair to attempt to force a layman" to answer the question, because he was "unqualified", is amusing to say the least.

It is next said in exoneration of the testimony of the witness, which we characterized as confusing and contradictory, that he "has plainly given the details of the conversations *which prove the agreement to have been for work on a time and material basis* \* \* \*". If it is contended that Gray, appellee's *only* witness to the conversation respecting the bid of August 2nd, establishes the contention that the work was agreed to be done on a *time and material* basis, then, we repeat that on that subject and *in support of that contention*, the witness's testimony *is* confusing and contradictory. Here is Gray's testimony:

Matson made the statement that he was dissatisfied with the price and thought it should be done for less money. \* \* \* That is what he told me, and he said he was going to send a timekeeper to the yards to get the benefit of whatever saving he could get on the job.

Q. Saving on what job?

A. Below this price; he claimed that the price was too high.

Q. Did you say that you would do it for that money?

A. Did I say I would do it for that money? If they stuck to the specifications, certainly.

Q. And he said that he would not pay you that price?

A. His idea was that it was too much.

Q. I want to know what he said.

A. He did not say he would not pay it.

Q. What did he say?

A. He said he was dissatisfied with it, he felt it was too high and he was going to send a timekeeper to the yard to keep track of the time on the job.

Q. *And it was to be a time and material job?*

A. Time and material *under those conditions*. I told him, I said, "If those specifications are adhered to I will see that it don't cost you more than \$11,749."

Q. In other words that was an outside price?

A. A limiting price.

Q. It should not cost more than that?

A. Not any more than that.

Q. So then, you and he did have a contract by which this work was to be done in strict accordance with the specifications not to exceed \$11,749?

(Objection by counsel.)

\* \* \* \* \*

A. Well, I told you what I said. I don't know as I have anything more to say regarding it.

Q. Read the question to the witness again.  
(Last question again repeated by reporter.)

A. Provided they stuck to the specifications.

Q. Your answer is yes?

A. Yes.

Q. And the work was to be done in 25 days, was it not?

Mr. FRANK. Well, the contract speaks for itself.

A. 25 days, yes.

Mr. McCLANAHAN. Q. Who was present when that agreement was finally reached?

A. Captain Matson, myself——

Q. (Intg.) Captain Saunders was there was he not?

A. You could not prove it by me. I don't know.

(VII, 2408-2410.)

We reiterate that if the foregoing are the “details of the conversations which prove the agreement to have been for work on a time and material basis,” our criticism of its being confusing and contradictory is all too mildly stated.

Furthermore, if, as claimed, this evidence conforms “in every respect to the proviso stricken from the report above referred to by the experts”, what of it? That proviso calls for a “colloquial” contract, such as that contended for, and is not in harmony with appellee’s contention that there was no such contract, but that the job was time and material. The proviso reads:

“The contract price as per the offer of the United Engineering Works under date August 2nd, 1909, was \$11,749, and 25 days, with the proviso that this was to be the upset price, and if the work could be done less than the above amount, figuring the best obtainable rates both for material and



labor, then the steamship company should receive the benefit of same.”

If there be anything either in Gray’s testimony or in the above report, supporting the necessary and vital contention of appellee in this case *that there was no contract* to do this work for \$11,749, but that it was to be done and charged for on a time and material basis, then we admit our incompetency to read plain English.

Counsel summarily disposes of the remaining portion of our brief on this subject of contract (pp. 149-158) by saying that it consists of comments upon the testimony of Christy, Klitgaard, Siverson and Curtis, who had nothing to do with it. But our contentions on these pages cannot be so lightly treated, and that the points there made have not been answered is proof that they cannot be.

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### Discrepancies in the Several Specification Exhibits.

(p. 66.)

The cross-examination of the witness, Christy, at its commencement is directed to the *original* specifications under which the “Hilonian” repair work was commenced (IV, 1230). The examination on this subject culminates at p. 1248 of the record in a request that there be produced the specifications on which the work was figured referred to in the bid of August 2nd. After a recess this occurred:

Mr. McCLANAHAN. Mr. Frank, have you secured the specifications?

A. I have a set of specifications here that comes with our records. Whether or not (it) is the par-

ticular specifications referred to in those letters I am unable to say.

Mr. McCLANAHAN. Is there no one that can enlighten us on that?

A. Not that I know of.

(IV, 1257.)

The list is then introduced as Respondent's Exhibit Christy "C".

The following then appears:

Q. And you cannot tell whether Exhibit "C", which has just been introduced in evidence is the original of the specifications or a list of work to be performed on the "Hilonian"?

A. I cannot.

Q. You cannot tell me now whether you received a copy of Exhibit "C"?

A. I cannot.

Q. You can tell me, however, that you did receive a copy of the work to be performed on the "Hilonian"?

A. I received a list of work to be performed on the "Hilonian".

Mr. McCLANAHAN. I will have to ask you, Mr. Frank, to produce from the records of the office the original of which a copy was made and given to the witness, or else admit that this is such a copy.

Mr. FRANK. That is the most unique demand I have ever heard of.

Mr. McCLANAHAN. Are you going to make an objection?

Mr. FRANK. Yes, I am. You want to demand of me that I make an admission to suit your case; I have no admission to make as to anything except what I know. I have produced what you have asked for, to the best of my knowledge. I have no admission to make of anything that I do not know anything about.

Mr. McCLANAHAN. Then I ask you to produce the original of these specifications or list of work which has been testified to by the witness.

Mr. FRANK. The witness has already told you they are destroyed. How can I do so?

Mr. McCLANAHAN. The witness has not testified to that effect. He testified to the effect that the copy he received from the office over here was destroyed. I want the original from which that copy was made.

Mr. FRANK. I have produced all the papers that I know anything about relating to that matter. I do not see the object of this. If you have the specifications that you claim are a part of that contract or the alleged contract it is in your power to produce them.

(IV, 1267-1268.)

With this evidence in view, how can counsel have the temerity to say:

*“The only specifications that the executive officers of the United had was respondent’s Exhibit Christy ‘C’.”*

Then, after averring that Christy “C” is identical with the copy annexed to the answer as Exhibit 1:

*“This fact is conclusive regarding the nature of the specifications upon which the bid was made and under which the work was undertaken.”*

Again counsel says:

*“The specifications, however, which are presented to the experts and under which their work is done is Respondent’s Exhibit Saunders No. 1 (p. 2639), which has an important addition in the last paragraph and an unimportant omission in the words ‘no less’ at the end of the seventh paragraph.”*

Where in all the record is to be found one word to substantiate the portion of this sentence which we have



italicized? Counsel must know that our experts *did no work under the specifications*. He must know that their work was done under an itemized heading of appellee's own bill (Schedule 1), which is reproduced in Kinsman's Exhibit No. 2, found at p. 2643 of the record. This itemization is a complete statement of all that was done and charged for.

Furthermore, Captain Saunders testified that the Union Iron Works, the Risdon and the "United," before any of their bids were submitted, all had in their possession both sets of specifications.

Q. Can you state whether or no they had both sets of specifications (Siverson "A", VII, 2658; Saunders 1, VII, 2639) in their possession before the bids were made which you have identified?

A. Yes, sir, they all had both sets.  
(V, 1762-1763.)

And Klitgaard identified Saunders' Exhibit No. 1 as containing the list of specification work as originally drawn by him (VI, 1927).

Adding to the foregoing Mr. Gardner's statement that the reassembling provision of Saunders' Exhibit No. 1 would be implied in any event, we submit that counsel's charge that that was an insertion by appellant "*ex industria* in the set of specifications *now contended for*," is entirely uncalled for, and on a par with many other extravagant statements which have been pointed out and which we shall continue to point out throughout the entire reply brief.

## Was the Quantum Meruit Satisfactorily Proven?

(p. 69.)

We are not disputing counsel's opening statement under this head to the effect that appellee's proof is based upon its card system but we do say that the further contention that this system "*was the basis upon which the United ascertained the cost of production (when) building upon their own account,*" is not supported by either counsel's reference to Curtis's testimony (IV, 1425-1431), or any other testimony in the case. In fact this is the first time we have had any intimation of the appellee *manufacturing on its own account*. The nearest to any such suggestion comes from Adamson with reference to the building of an engine under job number 4858 (I, 262), but this engine was clearly intended for the Standard Oil Co. boat upon which the "United" was working (Christy, IV, 1287). This failure of the record to substantiate counsel's suggestion that the appellee was a manufacturer on its own account adds point to our former contention that the *cost* of work can only be a fair measure of its value where (as in the case of a manufacturer on its own account), it is of a competitive character (opening brief, p. 131).

To counsel's further statement that the "United's" entire accounting system depended upon the card system we agree, with the proviso, *so far as the record discloses*. And furthermore, speaking solely from the record, we reaffirm that under this card system the matter of the segregation and apportionment of the day's work to each individual job number was a detail "affecting the pocketbook of the customer and not the libellant." That

appellee was utterly indifferent to this matter of ascertainment of time expended on particular job numbers, beyond leaving it to the individual workmen, is made perfectly clear by Mr. Christy himself, for he points out the only method by which it can be accomplished, and it was not the method employed, even though his testimony seems to hint that it was. On his cross-examination we find this:

It is not difficult, is it, to follow time and labor and material put on a *particular* piece of work?

A. If you have timekeepers on the work, why it is possible to keep a fairly accurate record of all the work done.

Q. Did you have any timekeepers on the Hilonian work?

A. We had *the timekeeper* always in our yard.

Q. Did you have one on the Hilonian work?

A. Not particularly the Hilonian; he keeps all of our work, all the work that is in the shop.

Q. What is his name?

A. The man in charge of the time department now is Walter White, the man that was in charge then was——

Q. Sjoberg?

A. Sjoberg.

(Christy, IV, 1282-1283.)

Poor Sjoberg! Known to all the men as the timekeeper; known to the manager of the works as the timekeeper; he is known to Curtis, *the man in charge of this particular litigation*, only as the "clerk" with so little knowledge of matters affecting the controversy as to make it unnecessary to call him to testify.

\* \* \* I would set the job numbers, that is, instruct the clerk to set the job numbers on these lists after reading them over.



Q. Whom do you mean by the clerk?

A. I mean Mr. Sjoberg.

Q. He is the man that some of these men call the timekeeper?

A. Yes sir.

(Curtis's direct examination, IV, 1427-1428.)

(We might parenthetically add that Sjoberg was the man that *all* the workmen called the timekeeper.)

Later on Curtis forgets and calls him by his true title:

I would go over the shop cards with the timekeeper in the office.

(id. 1430.)

And again:

A. Yes sir, these cards, and the timekeeper, and *this manner* I have explained is the usual and customary course of keeping accounts of the United Engineering Works.

(id. 1431.)

"This manner," referred to by the witness, consisted in sending to the foremen of the various departments a copy of the work to be done (id. 1428) and keeping a copy himself. When the work was completed the reports of the work done were collected and, after they were checked up with the foremen, they were consolidated into a heading for the customer's bill. After this these reports or lists of work were destroyed (id. 1428). As to the time cards and material cards, they were turned in every day after being daily checked by the different foremen, and were then gone over by

Curtis and, if ship time cards, were then turned over to the ship timekeeper. After Curtis and the ship timekeeper arrived at a settlement of the day's time these cards were destroyed (id. 1429). As to the shop time cards, after they reached the office from the foremen of the different departments, they were gone over by Curtis and the timekeeper *in the office*. They were then segregated and "consolidated" into the customer's bill (id. 1430). Subsequently, if no dispute arose with the customer after he got his bill, these cards also were destroyed (id. 1431).

The foregoing is the "usual and customary course of keeping the accounts of the United Engineering Works," and from it two very important facts stand out, namely:

1st. There is no ascertainment by appellee of the labor performed on the individual job numbers other than that shown by the personal record of the men; and

2nd. The cards are not memoranda such as make them an exception to the hearsay rule on the ground of accounts kept in the regular course of business. But this matter will receive our attention later.

There is no evidence in the case to show that the *handling* by appellee of the *completed* time cards of *ship workmen* was materially different from the handling of the cards of the *shop workmen*. Nor does there appear to be any reason why there should have been. For instance: Suppose both ship and shop work is done on a time and material basis, and the vessel has no timekeeper, and both ship and shop time cards show instances of workmen performing work *under separate*

*job numbers*,—why should not appellee's time checking system, intended to keep a check on the workmen's personal allotment of time to separate jobs, be the same for ship as for shop work? It undoubtedly was, and we have proof in this case of the exact extent of that system that sustains our contention that it did not include an independent checking of a man's time as applied to his personal allotment of it to separate jobs. In speaking of the system of checking *completed ship timecards*, on cross-examination Curtis says:

A. First, they would be checked over as regards the clock cards as to whether a man worked on that date. Then they would be checked over as regards the job numbers.

Q. Then what? Is that all?

A. Then they would be turned over to Mr. Putzar.

Q. I am talking about the checking, is that all the checking that was done?

A. That would be the checking.

(IV, 1493-1494.)

In case the owner has a timekeeper on the ship, Curtis says the timecards are again checked up by him with such timekeeper's time sheets (id. 1492).

Despite counsel's personalities which include charges of "inherent exaggeration," "fraud and collusion," "spleen," "forcing of balances," "malignity," "intemperate mind," etc., we submit that our criticism of appellee's system, as disclosed by the record, was temperate and does not warrant the statement that after ten years of business relations we suddenly find "that the entire works, including owner, foremen and workmen, is one nest of conspirators against its customers"



(pp. 71, 72). Furthermore, this and counsel's repeated references to the past amicable relations of the parties are unfortunate, because of the contradiction in the gratuitous statement of his own witness:

Well, I had one big row with the Matson Navigation Co. over a ship and this looked very much like another one coming.

(Gray, VII, 2381.)

In an attempt further to predjudice appellant in the mind of the court counsel reiterates the contention made under the heading "*Facts of the case,*" that appellant has been unfair in not agreeing to check this bill up, both before and after suit; that in the matter of pleading it resorted to technicalities to avoid fairly meeting the issue; and finally, in the matter of time and material cards, it made covert suggestions as to their correctness after they had been placed in the record, and repeatedly declined to point out these errors that they might be explained. As we have already in part answered appellee on this score, we will be brief in our further reply, as the contentions are all foreign to any issue before the court.

As showing appellant's true spirit in this controversy, it will be remembered that in order to avoid litigation it proposed to pay appellee's bill at a compromise figure.

Q. Very well. But you yourself, acting as assistant general manager of this company, have proposed figures to be paid for this bill, have you not?

A. In trying to arrive at an amicable settlement and avoid a law suit I did in Capt. Matson's absence at Honolulu.

(Diericx, I, 105.)

As to the charge that appellant has been unfair in the matter of settling the pleadings, it will be seen that in the original libel, as filed, there was a discrepancy between the amount sued for and the sum total of the various schedules, resulting from a duplication or repetition in Schedule 3 of certain items in Schedule 2 as shown at pp. 35 and 36 of the record. This discrepancy called for exceptions to the libel which were filed and afterwards, by consent, overruled pro forma (1, 45). Its answer was then filed denying, under the first cause of action, that Schedules 1, 2 and 3 truly set forth the particulars and value of material and labor done on the "Hilonian" and, as a separate answer, it sets up the contract of August 2nd. As to the second cause of action, appellant admitted the allegations pertaining to Schedules 4 to 10, except as to two minor items in Schedule 4 and two in Schedule 9, and then affirmatively alleges that there is due and owing under both causes of action \$22,922.56, which it tendered to the appellee on May 2nd, 1910. We attached to our answer two interrogatories, one of which called upon respondent to admit that our Exhibit 1 was a true copy of the original specifications or point out wherein it differed. The other called upon respondent to admit that Exhibit 2 was a true copy of its bid of August 2nd, 1909 (I, 57). Neither of these interrogatories was ever answered by appellee.

To our answer appellee filed exceptions which were partially sustained, but not to the extent of requiring appellant to make its answer any more definite as to the values alleged in the libel, and permitting it to call

for proof respecting such of the items as it had no knowledge of. Appellant then filed its amended answer denying knowledge of the truth of the *particular materials and labor and the value thereof* (I, 22-32). As to *the particulars of the work performed*, appellant's answer admitted in detail the work done on the "Hilonian" (I, 64-71), and this admission covers the allegation of such work as shown by Schedule 1 of the libel, with a few minor exceptions, as for instance:

Schedule 1 starts out with, "Renewed No. 4 tank top on port side." Our answer admits: "Renewed *part of* No. 4 tank top on port side." Another item of the schedule recites: "Tested 3 stm. gauges, supplied 2 stm. and 2 amonia gauges." Our answer admits: "Tested 3 stm. gauges, supplied 2 stm. and 1 amonia gauge" (I, 69).

Minor differences such as these were covered by the concluding paragraph of the answer, wherein we called for proof because of our lack of knowledge (I, 171). And right here be it said that such proof by appellee was never made.

Finally, appellee again excepted to our answer as amended, which exceptions were overruled (I, 84). This record, we submit, does not show that appellant "resorted to technicalities to avoid fairly meeting the issue" as claimed by counsel. Again, as to our refusal to give to counsel the fruits of our labor in the matter of charges appearing in appellee's quantum meruit proof, which were the subject of contracts, we have no apologies to offer. We declined, and properly so, to give appellee *an opportunity for explanation*. At the



time, in the heat of trial, this matter of irregularities in appellee's proof was of course not fully developed, and its subsequent development to the extent we have pointed out was a task of considerable magnitude. But the point of the whole matter is that this was appellee's case, and it had no right to demand that we assist in making it proof against attack. Our reply to this demand was perfectly proper.

All of the proof of your case has been presented by you. You should know what it is. You should know that there is not, or that there is, such evidence as I have suggested. If you claim that there is not, it is a matter of issue between us to be threshed out on the argument of the case.

(V, 1649.)

Small wonder that counsel did not carry out his threat to take before the court his demand that appellant's counsel be added to appellee's staff of attorneys, and to suggest that the reason for not doing so was because it was "*lost sight of because of difficulty in securing a time convenient to the court to take up such controversy*" is nearer the truth than counsel thought, for no court would find "*time convenient*" to hear such a puerile demand.

Appellee's case was closed with the agreed reservation that the matter might be taken before the court and Mr. Curtis might be further called for re-direct examination thereafter (V, 1654). In the further conduct of the case both counsel appeared before the court on at least one occasion that we remember (VI, 2126), but nothing was then said of this reserved question, and the real reason was obvious, for we have learned

that counsel is not given to *real* forgetfulness in matters of importance.

Counsel makes caustic criticism of our statement that Appendix 1 of our brief does not pretend to be complete, and adds that "We think it fair to infer that he has called attention to all that he could '*invent*'" (p. 81). If anything shown in Appendix 1 is an invention, the time cards referred to therein were in counsel's possession and it would have been a very simple matter to prove such invention, and counsel's declaration of his intention to "presently" show how "*palpably unfounded those objections are*" never took any more definite shape than a reference to certain parts of the record "as a complete answer" (Appendix 2, reply brief, p. 79). What there is in this offered evidence that shows an invention, or has the remotest bearing on our charge that Schedule 1 of the libel has included in it labor charges on piston rods, thrust collars and spring bearings (contract work under Schedule 4); labor charges on brake rig on reversing shaft (contract work under Schedule 7); labor charges on main bearings (contract work under Schedule 8); labor charges on smokestack (contract work under Schedule 9); labor charges on tube heads (contract work under Schedule 10), we fail to see. And if this be counsel's showing of invention, and of how "*palpably unfounded these charges are,*" then nothing can be said of the desperate recklessness of both the charge and the offer.

If a workman works on "tube heads" it is to be presumed that he has intelligence sufficient to put tube heads on his time card and, if Curtis has told him that the job number for tube heads is 5295, and he puts that on his card, and Curtis charges all 5295 work as a quan-

tum meruit, we cannot see how counsel, except he be desperate with his back to the wall, can characterize as an *invention* our assertion that such a charge is a duplication of a contract. And so with all the items of Appendix 1.

As to spring bearings, main bearings and smokestack work appearing on Appendix 1, as quantum meruit charges, surely there is no invention as to these, for counsel admits them to have been charged in Schedule 1, but tries to justify such charge on the ground that they are extras.

It would entail much additional labor, and we believe it to be unnecessary in view of the clear failure of counsel to meet the showing made by Appendix 1, for us to substantiate by a further examination of the record our statement that the duplication list does not pretend to be complete. We are convinced now, however, that in crediting Curtis's statement that he has not charged in Schedule 1 any contract schedule numbers appearing on cards where there are proper quantum meruit numbers (IV, 1436), we have perhaps gone too far. If, for instance, Schedule 1 is charged by Curtis with the 23 hours of work under contract 5401 shown by the card of John Williams, dated Sept. 19th, part of Adamson's Exhibit 127 (the only entry on the card and a card by the way which might be properly added to the Appendix as one overlooked by us in compiling that list), why should the court, on Curtis's unsupported statement, believe that when 5401 appears on other cards *with* a quantum meruit number he *omitted* to charge it. It seems to us that if he has the effrontery to say that the former is a proper charge the reason for believing that



the latter has also been charged is at least a reasonable one.

Counsel does not attempt to explain Appendix 1 on the ground of mistake, or, as we tried on the cross-examination of Curtis to get him to explain it, on the ground of an inadvertence, but in fact these charges are defended on the inappropriate testimony referred to showing "*conclusively, that the same thing is called by different names by the different men.*" Counsel then says that the description of the work on the card is not the controlling element, but "the job numbers are" (Appendix 2, p. 80). If that be so, what has counsel to say of the card of Sept. 19th of John Williams referred to supra? It is also said that our "criticism is not directed to having the bill corrected" because the "113 instances," cited in Appendix 1, amount to an overcharge of only \$602, and this is so insignificant when compared to a thirty thousand dollar bill as to make the claim of "hopeless error" ridiculous. This sounds all very fine, even assuming that the figure of \$602 is correct, but it must be remembered that the amount in controversy in this case is not thirty thousand dollars but approximately twelve thousand, and that \$602 is five per cent of this latter amount. If, moreover, Appendix 1 showed our only criticism of Schedule 1 being an overcharge on appellee's "cost" estimate of quantum meruit value, that would be one thing, but there must be considered a score or more of other criticisms of both shop cards and time sheet charges, of lax methods, of improper overtime, improper allowances of bonus time, of power-house time, and time not legally proven. We venture to say that were all our just criticisms embodied in one lump deduction from appellee's thirty-four

thousand dollar bill it would be found that our offer of twenty-two odd thousand dollars, based on our experts' estimate, greatly exceeded the result.

It is rightly said that our criticism of error is not made for the purpose of correcting appellee's bill, but it is not, however, *altogether true* that the purpose of showing these double charges is that it may have a psychological effect in inducing the court to entirely disregard the time and material cards as untrustworthy. We have another equally cogent reason, and that is that we hope by our criticisms to have pointed out to the court a reason for the difference of twelve thousand dollars between appellee's proof of alleged cost and our proof of reasonable market value.

From this subject of our criticism of time cards, counsel next plunges into a defense of Adamson's special ability to do what we have termed "phenomenal" and "preposterously absurd." It is said that Adamson was a *specialist* and an *expert*. We are inclined to agree with these encomiums if and when applied to Adamson as a witness. However, let us analyze the contention that he *specialized* in timekeeping. In the first place we have not, as stated by counsel, assumed "that Adamson's duties were more numerous than they in fact were." Our statement of his duties finds support in the record as our opening brief shows (pp. 34-35). Indeed, we could have added to our references the very important fact that this man's duties *kept* him at the surface table (II, 467-470). The assertion made by Adamson that his position of assistant foreman was "*created absolutely for the purpose of keeping the proper time of the separate jobs*" is, to use a vulgarism,

all poppycock. Mr. Christy, the general manager, knew something about this matter of who was keeping time on separate jobs, and here is what he says:

Q. It is not difficult, is it, to follow the time and labor and material put on a particular piece of work?

A. If you have timekeepers on the work, why, it is possible to keep a fairly accurate record of all work done.

Q. Did you have any timekeepers on the "Hilonian" work?

A. We had the timekeeper always in our yard.

Q. Did you have one on the "Hilonian" work?

A. Not particularly the "Hilonian"; he keeps all of our work, all the work that is in the shop.

Q. What is his name?

A. The man in charge of the time department now is Walter White; the man that was in charge then was——

Q. Sjoberg?

A. Sjoberg.

(IV, 1282, 1283.)

Furthermore, the temerity of counsel passes all understanding when he would lead the court to believe that Adamson was still specializing in timekeeping with satisfactory results at the time of the hearing of this case. Referring to our expressions "phenomenal" and "preposterously absurd," as applied to Adamson's claim as a timekeeper, counsel says:

"Moreover the adjectives lose their force when we consider that that method was continued at the works up to the time that the witness was testifying and gave satisfactory results."

As the claim is made that Adamson's position as *assistant foreman* was created for the very purpose of



keeping time on separate jobs, this must be what counsel refers to in the sentence just quoted. As a matter of fact the *present* assistant foreman fills Adamson's *old* position *without keeping time*, and Doig's position of foreman, which formerly carried with it this duty until "*it was found that it was too much for one man,*" is now occupied by Adamson who does *keep the time*.

Q. Mr. Adamson, is there an assistant foreman in the machine shop now?

A. Yes, sir, there is a man on the surface plate that fills the position I had at the time this work was going on.

Q. Who checks up the time now?

A. I do.

Q. As a foreman?

A. Yes, sir.

(II, 322.)

"Moreover, the adjectives lose their force when we consider that that method was continued at the works up to the time that the witness was testifying and gave satisfactory results."

If "*the very existence of the institution*" depends on the practical accuracy with which time is kept on separate jobs, and the position of assistant foreman was created to secure such accuracy, because such duty added to the foreman was found too much for one man, then, as the foreman is now doing that work for which Adamson's former position was "*created absolutely,*" the existence of appellee's business life must indeed be seriously threatened.

Counsel speaks of the corrections on the cards as indicative of Adamson's timekeeping. We believe that

with but two exceptions the record shows that there were no corrections on the cards except as to *job numbers* and *dates*, and that none of the cards show corrections in the time placed there by the man as indicating the labor expended on the individual job numbers, except the cards of Stephen Cronin and Alfred Boyer, the former a boy 16 years old when this work was done (II, 696), and the latter 19 (III, 901). The evidence of both these show that the corrections of time on their cards were made *by Sjoberg, the timekeeper, from the time clock*. In other words, the timekeeper found that the *aggregate* number of hours shown on the cards of these two boys did not correspond with the time clock record and, in performance of his duty as suggested by us in our opening brief, he changed the cards to conform to the clock. Cronin on direct examination testified that certain changes on his cards in the hours were made by the timekeeper (II, 689). On cross-examination we find the following:

Q. You kept your own time, did you?

A. Yes, sir.

Q. You speak of a timekeeper; he was the man in the office, was he not?

A. Yes, sir.

Q. Why do you call him the timekeeper?

A. He always kept track of the time, I guess.

Q. I do not want you to guess; do you know?

A. Yes, sir; he kept track of the time.

Q. How did he keep track of the time?

A. Well, by taking it off the time-cards and putting it down in the book, I guess.

Q. "I guess again." Do you know?

A. Yes, sir, I know.

Q. You knew then that he took the time from the cards and put it down in the books?

A. In books.

Q. In the office?

A. Yes, sir.

Q. Is that all he did with reference to keeping time?

A. I don't remember what else he did.

Q. That is all you know of?

A. Yes, sir.

Q. So that he knew nothing about the time except as he found it on the cards that you turned into the office?

A. Yes, sir.

Q. He was called the timekeeper?

A. Yes, sir.

Q. Did you have any other timekeeper?

A. No, sir.

\* \* \* \* \*

Q. I hand you your exhibit No. 1 and ask you who made the red ink change?

A. The timekeeper.

Q. The 4½ hours?

A. Yes, sir.

Q. How did he know anything about that?

A. It was punched on the clock.

Q. What is punched on the clock?

A. The time I came in. He came over and told me about it and changed it.

(II, 696, 698.)

Referring to another card showing a change, we find this:

Q. What did the timekeeper change it for?

A. Because I made a mistake in the time, and I punched the clock and the clock punched out 3½ hours, and I made a mistake.

(id. 700, 701.)



And again, referring to the clock:

Q. It gives the time you come in and the time you go out exactly?

A. Yes sir.

\* \* \* \* \*

Q. How did the clock tell you how much of that 7½ hours belonged to 5295?

A. I kept track of the time that I worked on each job number.

Q. I am speaking about the time clock that you punched. How could that tell how much of the 7½ hours belonged to 5295?

A. It don't tell that.

Q. How did the timekeeper know to make that correction?

A. He asked me; he came over and I had it down on a piece of paper and he asked me to look it up. I looked it up and I had 4 hours on that, and the rest of the hours on the other job. I told him I looked at the watch and I guess the mistake was on the watch.

(id. 701, 702.)

Boyer, on his cross-examination, in referring to a change appearing on one of his cards where 12½ hours was reduced to 12 by the timekeeper, was asked:

Q. How would he know whether you had made a mistake or not?

A. By punching the clock, the time clock.

(III, 896.)

We conclude, therefore, that, but for Adamson's own say-so, the record discloses that of the twelve or thirteen hundred time cards introduced there are few showing a correction of time worked on individual job numbers, and that, where such corrections do appear, they were made by the timekeeper and not Adamson, and were

made for the purpose of having the cards conform to the time clock; all of which bears out our contention that under appellee's system the only thought is given to the aggregate number of hours shown on the time card, and its segregation among the various job numbers was left solely to the workmen (opening brief, pp. 14, 15). Not only does counsel make this futile attempt to bolster up Adamson's case by referring to so-called "*corrections*" which he never made, and which when made had no connection whatever with the matter of accuracy of the workmen's record respecting time worked on separate job numbers, but he brings to the rescue Mr. Curtis who, having "*no personal knowledge of the length of time the individual workmen were employed upon a particular job \* \* \**", —we will stop right there in our quotation for the admission makes absolutely immaterial anything else that could possibly be said about Curtis. And yet the desperate position in which appellee is placed regarding the Adamson proof is here illustrated by this reference to Curtis. Counsel need not have thus apologized for Curtis's lack of "*personal knowledge*" for if, as stated, "he had the whole job under supervision, followed it closely from day to day, and himself went with the cards in case of doubt into the shop, consulted with the men and consulted the piece itself upon which work was performed in order to insure the accuracy of the record," then, we submit, he knew as much or more than Adamson, but, like Adamson, lacking "*personal knowledge*" of the time expended on the "Hilonian" job numbers as recorded on the timecards, his knowledge of all else con-

nected with the job did not and could not fit him as an instrument by which these time card records were attempted to be made independent evidence of the facts recorded on them.

We will pass over with little comment the defense made of Adamson's "personal knowledge" of overtime night work performed during his absence. It rests solely upon the "*good idea*" of the witness and is fully met in our opening brief (pp. 45-48).

This brings us to a consideration of appellee's *defense* of the Mockel incident, the basis of our most serious attack on Adamson. Perhaps we improperly characterized counsel's effort, for, if "*apprehending*" that an attack would be made on the question of the witness's lack of "*personal knowledge*" during times when he "*was not there to check it up*" and "*could not guarantee that he (the workman) had been there,*" the "*precaution*" was taken to "*specially call the particular men who had worked on the 'Hilonian' job during the time that Adamson was so absent,*" then, we submit that in this we find not a *defense* of the witness's testimony but rather an admission of its worthlessness, coupled with an admission of liability to make good the resulting breach made in appellee's proof. If counsel has no defense to make of the desperate recklessness of Adamson in first repudiating Mockel's card of Sept. 12th, and subsequently vouching for not only *its* correctness but also the correctness of every other Sunday card put before him, then Adamson as a witness is admittedly discredited, and we submit his entire



evidence, upon which rests the admissibility of the cards of 58 of the workmen, should be disregarded.

Throughout counsel's brief we find repeatedly statements of fact which astound us, for the reason that it is impossible to verify them by the record. If such statements are made through inadvertence, well and good; if they are deliberately made then we have nothing to say further than to express our belief that they are indicative of the desperate straits appellee finds itself in in attempting to meet vital points of the attack made on its proof of its quantum meruit case.

The statement to which we specially call attention now is the one italicized at the top of p. 88 of the brief. Adamson was absent during the progress of the "Hilonian" work on five days, August 29th, Sept. 5th, 12th, 19th, all Sundays (opening brief, pp. 40, 41), and Sept. 6th, a holiday (id. 42). For these five days of absence Adamson vouched for the correctness of the time of the following workmen, 31 in all: Mockel; Benson; Stimmel; Boyer; Strowenjans; Martiolo; McDonald; Kasener; Wilson; Larrando; Pennycott; Thomas; Gus Albers; David Doig, Jr.; Turner; Furman; Williams; M. W. Albers; Hay; C. Schmidt; Wodjacki; Schafer; Chandler; Young; Holmquist; Read; Mello; Bouick; Higgins; Francisco; William Schmidt.

Counsel says:

"Apprehending the question that would be raised by respondent respecting this time, as well as the time that Adamson was absent from the works, we took the precaution *to specially call the particular*

*men who had worked upon the Hilonian job during the time that Adamson was so absent."*

(pp. 87, 88.)

If this statement found confirmation in the record, it would cure the lack of proof which theretofore had existed, even if it did not heighten one's confidence in Adamson, but as a matter of fact counsel's all embracing statement has barely one-half of truth in it, for he calls but 15 men out of 31, and Chandler, one of the 15, although so "*specially called*" to "*testify directly with respect to that particular time,*" namely: the time shown on his cards of Sept. 5th, 6th and 19th (I, 232), is only asked about the cards of Sept. 5th and 6th, and then only replies: "*They are both in my handwriting*"; and when opposing counsel asks if these two are cards that Adamson *failed* to identify he replies: "*Yes, that is all*" (IV, 1421).

In the foregoing enumeration we make no reference to any of the time of men working *at night* during the 22 days of Adamson's absence, and, were we to go to the labor of segregating from the cards of the 73 men vouched for by Adamson, those covering these 22 nights, and should add the new names so segregated to our list, we are confident that the inaccuracy of counsel's statement would appear even more clearly.

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### **Adamson's Personal Cards of August 25th, 26th, September 7th and 18th.**

(Reply Brief, pp. 92-95.)

Counsel meets our argument under this heading (opening brief, pp. 43-45) first, by stating facts and

drawing inferences based on the *existence* of these cards, and secondly, by *hinting at their possible loss*.

On the threshold of the direct examination of Adamson counsel laid the foundation for the introduction of all the time cards by showing that the witness possessed the essential requisite of personal knowledge of the time worked by each man on each job. Here was how it was done:

Q. What do you do with respect to the time or noting the time that the man at the machine takes the job and the time when he finishes it?

A. I take note of when I give the man the job and I know when the job is finished, and the time it comes off that machine, and then I know what time he has been on it, I know how long it takes.

(Adamson, I, 191.)

If this evidence is not the sole basis of appellee's right to use Adamson as a medium through which all these time cards have been introduced as independent evidence of the facts they record, then, what is? It is not a question of inference on our part, but it is a recorded fact, without which libelant's proof would go a-glimmering. That this evidence states the only means through which the witness meets the legal requirement entitling him to vouch for the time on these cards is not only our contention, but it must be counsel's also or his proof fails, for Adamson's "*good idea*" falls far short of the legal requisite. It is said:

*"This contention, as to his means of keeping track of the work, is based upon a single sentence in the testimony and closes its eye to the further statement, that, keeping track of the men's time was the special business of Adamson, the very purpose for*



*which he was appointed, and the surface table was only referred to as one of the means to that end."*

Counsel is wandering. Work at the "surface table" is not the basis of Adamson's qualification:

*I take note of when I give the man the job and I know when the job is finished, and the time it comes off that machine, and then I know what time he has been on it, I know how long it takes.*

This and nothing else fills the legal requirement. That he says keeping track of the men's time was his special business, "the very purpose for which he was appointed", is immaterial as affecting in any way *how he did it*. If he did not do it in the way he says he did, how then did he do it? The surface table work may have been the initial means by which the witness was placed in contact with the "Hilonian" work, which he afterwards turned over to the men, but his sole means of *keeping time* on this work was the result of actual contact with the men in their doing of it, as he has so plainly stated. Counsel closes this phase of his reply with *inferences* too puerile to need attention (see last paragraph on p. 93).

As an alternative proposition counsel hints at a possible loss of these cards. He says: "*That four cards that should not have been discarded or destroyed should have been lost in this segregation is not at all remarkable.*" And then he adds "*Without doubt, owing to the multiplicity of matters occupying the libelant in the prosecution of the case during that time, the explanation was forgotten*", etc. What does counsel now desire the court to understand? That

these particular four cards of the twelve hundred odd that had been segregated from many thousand others were subsequently lost? If so, why hint at it? Why not frankly say that these cards were lost and, if lost, why was this not proven when they were called for? The proceedings at the time are illuminative.

The first request for the cards' production was made during the cross-examination of Adamson, and was as follows:

Mr. McCLANAHAN. Mr. Frank, will you please produce Adamson's time cards for September 5th, 6th, 7th, 18th, 19th, August 25th and 26th?

(II, 464.)

(It will be remembered that subsequently we found from Adamson's clock cards that he was not present on September 5th, 6th and 19th.) Our next request was made on the same day both before and after the noon recess:

Mr. McCLANAHAN. With the possible further cross-examination with reference to the cards that I have asked you to produce. I have now finished with the witness.

Mr. FRANK. Then we had better take an adjournment until 2 o'clock.

Mr. McCLANAHAN. Will you have the cards then?

Mr. FRANK. We will look for the cards.

Mr. McCLANAHAN. All right.

(A recess was thereupon taken until 2 p. m.)

#### Afternoon Session.

ROBERT ADAMSON, recalled.

Mr. McCLANAHAN. Did you get the time cards, Mr. Frank?

Mr. FRANK. No. Do you think there will be much more cross-examination, Mr. McClanahan, after you get the time cards? I would like to take up my examination all at once.

Mr. McCLANAHAN. I think there will be very little more cross-examination after I get those cards, the cards of September 5, 6, 7, 18, 19 and August 25 and 26.

Mr. FRANK. What are you repeating them for? We had them in the record this morning. \* \* \*

(II, 470-471.)

And thereafter the cards were never produced nor was there the slightest suggestion ever made of their loss.

Under these circumstances we submit that we have properly drawn the inferences shown at pages 44 and 45 of our opening brief.

Answering our further contention that if these withheld cards *do* show "Hilonian" work, then appellee's bill is incorrect to the extent of the unknown number of hours shown by the cards, counsel says that this is not a matter for complaint for the error is in appellant's favor "and the loss is the loss of the United—*those hours not being charged in the bill*". Here is another of counsel's astounding statements. This bill was made up, if we can go by its date, September 27, 1909, and was compiled from the cards that had been turned in *at that time*. What then is the basis for counsel's statement that those hours were not charged in the bill?

Fearing that the court might not look with favor on either of its contentions with reference to Adam-



son's missing cards of these four dates, appellee concludes discussion of the subject by making a "*suggestion*", in order to keep the court from being misled with respect to the proof of the time of the men covered by the dates under discussion,—in short, even though the circumstances should point to failure of legal proof through Adamson, the proof was later on supplied by the men themselves. And this "*suggestion*" is made "*so that the court will not be led into error with respect to the men's time*" (95).

Counsel is again becoming careless or at least is unfortunate in the use of words to express facts for, when he then says: "That a large number of Adamson's *exhibits* were resubmitted *to the men themselves* to prove their verity, both in respect to overtime, night work and *work covered by the dates mentioned*", his words carry an inference at least that is even farther from the truth than the analogous statement made with reference to the other dates, which we have characterized as being barely half truth. Despite counsel's broad statement to the contrary we do contend, *without the slightest fear of contradiction*, that Adamson's exhibits covering August 25th, 26th, September 7th and 18th were "*resubmitted*" to only *eight of the thirty-four* men mentioned on page 43 of our brief, and that there remained the cards of twenty-six men of those dates *entirely depending upon the Adamson proof*. We correct counsel's "*suggestion*" for the same reason that it was made: "*That the court will not be led into error*".

## The Allowance of 9 Hours for Shop Work When but 8½ Hours of Work Were Actually Performed.

(Reply Brief, pp. 95-99.)

If there be found in our opening brief on this subject (pp. 53-56; also pp. 126, 127) any justification for the charge that our contention on this subject "*is again an evidence of his unfairness in his treatment of the case*", we trust the court will deal leniently with this persistent frailty with which, in counsel's mind, we are obsessed. Our *unfair* contention amounts to this:

That in the ascertainment of the reasonable value of a thing, *based on its cost*, it is inequitable to include in such value a *profit* on an exigency of the cost for which the buyer receives no return, and that to do so is to establish a value not *reasonable* but unreasonable.

Secondly, our *unfair* contention amounts to this: That in the ascertainment of the reasonable value of a thing, *based on its cost*, it is fatal to libelant's proof not to show that the unemployed time which respondent is called upon to pay for, *with a profit*, is not equally distributed in cases where the workman in one day works on several different jobs.

And lastly, our *unfair* contention amounts to this: That in the ascertainment of the reasonable value of a thing, *based on its cost*, it is unjustifiable to include, as part of such value, a charge for the use of air tools during a period when they are not used.

There is but one statement of counsel on this general topic which we feel requires further answer. He says:

“The profit that the iron works obtains from a given job is a gross amount; it is the difference between the cost of performing the work and the amount it receives” (97). This statement, we assume, applies to the case at bar and, if so, it is misleading. We are not discussing a gross profit, but have under analysis the *details* of such gross profit. Practically libelant’s entire profit, as shown by the record in this case, is covered by the difference between what it pays for its labor and what it bills it at. Its billing rate carries a profit and, if it is applied, as in this case, to unemployed time, of course, it is evident that a profit is being made on such time. We can hardly be criticized for using libelant’s own billing rates for labor in this argument, especially as the proof is that, *“It was a good, liberal rate over and above cost, and carried a good profit with it”* (Gardner, VII, 2338). If it was an *“improper”* rate the record fails to disclose that fact.

Counsel’s defense of bonus time for air tools is found at page 125 of brief and can be briefly answered. Reference is made to the charge on Schedule 1 of the libel:

“Air tool hand operator 1023    \$1.25    \$1278.75”

Counsel then says:

*“In this charge the per hour rate of the tool is reduced the same as the per hour rate of the man; consequently to equalize the charge, the air tool time must correspond with the man’s time. Had this time not been made to correspond with the man’s time the \$1.25 must have been increased correspondingly.”*



We must admit in the first place that we do not know what counsel is talking about. In the next place his statement that in the charge this per hour rate of the tool and the man is "*reduced*" is entirely gratuitous, without a word of the record to support it. And lastly, if the two sentences quoted have any meaning or applicability to the subject matter of our charge that air tool bonus time is billed to us, they point to an admission that such is the case.

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### Overtime.

(Reply Brief, p. 99.)

Answer is first made on this subject to our contention as found at pages 56-57 of our brief. At that place we have taken a simple illustration to point to the injustice of these overtime charges *when coupled with the bonus or unemployed time which we had just discussed*, and we are frank to confess that we are unable to comprehend the point of counsel's criticism of the illustration. If a man's shop card shows 9 hours of straight time and one-half hour of overtime, he has *worked* but 9 hours, yet he is paid for 9 hours straight time and one-half hour overtime. This is perfectly apparent but counsel's criticism is not applicable. Let us paraphrase it to illustrate the true situation: "In other words, respondent is billed for 10 hours time at 65¢ an hour which equals \$6.50. If, however, the *rate* had been doubled instead of the *time*, the charge would appear thus:

9 hours at 65¢ = \$6.50, and  
 1½ hour at 1.30 = .65, which  
 being added together = \$7.15   "

The 10 hours billed at the straight 65¢ rate are made up of 9 hours straight time and one-half hour overtime *doubled*. The trouble with counsel's illustration is that even though it had been stated properly it means nothing as an answer to the contention of our brief.

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### **Putzar's Position and His Relations to the Parties.**

This discussion consumes nearly nineteen pages of appellee's brief (100-119), but we shall find no difficulty in answering in brief space what counsel is pleased to call our "*tirade*" upon Putzar's relations to the appellee. While we shall remain mute as to the many personal attacks under this heading, we shall certainly correct some of the statements of fact made. Let us start out with this as a preliminary suggestion:

While Putzar's time sheets properly proven may be *prima facie* evidence of the time thereon recorded, it nevertheless was appellant's right to overcome this *prima facie* case by showing that the time sheets represented no more than matter copied from appellee's time cards, and that Putzar did not keep an independent record, in which case the *prima facie* showing would, of course, be destroyed. It was our further right to show the *probabilities* of our contention by drawing attention to the relations existing between Putzar and the appellee for, if these relations were to any degree intimate, they would have some bearing on the question of how far Putzar might have been

influenced by the time cards presented to him as *appellee's* showing of the time. A showing of close and friendly relations might have some bearing on the probabilities of Putzar *taking for granted* the correctness of appellee's cards and, moreover, if such relations existed and did have some part in Putzar's action, surely it would not call for an attack on the man's integrity and reputation, such as is said we have made, but which we emphatically deny. In an honest though misguided conception of his duty Putzar may have adopted the time card record as his own in the belief that, as the appellee was paying its men on that record, there could ordinarily be no reason to doubt its accuracy, especially as the time which necessarily must have been consumed in keeping an independent record could be more profitably spent in other work. This we say might well have been Putzar's conception of the proper performance of his duty, and to say so does not carry with it any imputation of dishonesty or fraud, nor did anything done by us or disclosed by the record carry such imputation. We were, as was our right, meeting appellee's *prima facie* showing by putting before the court the relations of the parties as bearing on the probabilities touching our contention of the work being copy work, as well as our reason why he was not called by one party and could safely have been called by the other. And the showing of the relations between Putzar and appellee does not, nor was it intended, to "cast suspicion upon the integrity of their transactions", as stated by counsel.



Now, briefly, as to a few of counsel's statements of fact. It is said at page 109: "*That Putzar kept an independent time book is not disputed \* \* \**". And again: "*Now we say it is admitted that Putzar kept an independent record in a hand book*". How can counsel make these assertions? Why, the very crux of our contention, as the court knows well, is that such was not the fact. Where does counsel find support in the record for these remarkable and material assertions?

Again, at page 113, in speaking of Putzar's independent record of night time work, it is said:

"There was also some night work after Mr. Putzar was appointed engineer, *during which time it is conceded that he was on board.*"

We emphatically deny any such concession, and ask that counsel substantiate the statement from the record if he can, or even meet the inferences to be drawn from the following testimony:

Q. Were you on there every night when work was being carried on by the United Engineering Works?

A. Yes, sir.

Q. Did you ever see Mr. Putzar on the ship at night?

A. I don't remember ever seeing him on at night, he might have been there though.

(Klitgaard, VI, 1925.)

Q. Did Mr. Putzar occupy a room on the Hilonian during the repair work?

A. He did not.

(Kinsman, V, 1872.)

Again will counsel substantiate this statement referring to the *night shift in the engine room*:

“These men were checked off when they went to work in the evening, *at which time Putzar was present*. In the morning they were checked off by the night foreman and the day foreman, *in which checking again Putzar was present to take part.*”

(p. 111.)

The only reference made to this checking off of the men as they went *on* and *off* the ship is that made by Kinsman, referred to at p. 91 of the opening brief, while Siverson says:

“I know that he (Putzar) *was counting the men every day.*”

(Opening brief, p. 90.)

Siverson was the *day* foreman and his statement does not support counsel's sweeping assertion of Putzar's presence and participation in the checking off of the engine room night shift morning and evening.

Under this heading we desire to correct counsel in another misapprehension. We are informed there is a great difference between keeping time *on the ship* and time *in the shop* (p. 110), and that such difference lies in the lack of necessity to *segregate* the time on the ship, and in the matter of engine room night work in the fact that the work is said to be “*homogeneous*”. These contentions both show a forgetfulness on counsel's part of appellee's legal obligation in this case, which is to prove the reasonable value of the work

done. To do this it is primarily necessary to prove the reasonably necessary time that it takes to do the work. Appellee has seen fit in order to meet this primary requisite to show the time *actually employed*. Putzar's time sheets do not meet this proof since Putzar is not shown to have had knowledge of such *actually employed* time. His knowledge that a man goes on the ship at one hour of the evening and comes off at another hour the next morning is clearly insufficient to establish legal proof of the requisite fact of the time worked by the man in the Hilonian engine room. The fact, as contended for by counsel and used in extenuation of Putzar's claimed independent timekeeping, that in keeping ship time there are no job numbers or separate jobs to be segregated, and that the work is "homogeneous", has nothing to do with Putzar's requisite knowledge of the time actually worked by the night shift during the 23 days in question. And, by the way, where does Putzar get his knowledge of a man's night work being "*homogeneous*", that is, that he "*worked the entire time upon a single job*", except from seeing the time card entry of that fact.

Lastly, in answering our contention as to time sheet entries from Sept. 17th to 24th being made by Curtis (opening brief, pp. 110-113), it is said that "*It is immaterial who did the clerical work of transferring the time to these sheets.*" If this statement is intended to apply to the requisite proof appellee must make in this case, then we submit its truth is wholly dependent upon



whether it has been shown, first, that Putzar kept an independent record of the time from Sept. 17th to 24th, and second, whether that record being kept had been compared with the time cards and found to harmonize, for it will be remembered that the time sheets covering these dates are admittedly but a resume or copy of the time cards, and the copying done by Curtis was after the work on the "Hilonian" was finished (V, 1528), so that Putzar's signature after the printed statement: "Time on board correct" was placed on these sheets after his agency as timekeeper had ceased. And why that signature appears on appellee's copies and not on appellant's has yet to be explained (opening brief, 113).

Answer to our overtime contention (opening brief, p. 122) as applied to Putzar's time sheets is found at p. 126 of the reply brief. Briefly stated, we contend that it is no part of the reasonable value of work, *when based on its cost*, to include payment of overtime unless the workman has *first* worked straight time *for our account*. Counsel's sole answer to this contention is that we have made errors in our list of "instances" found on p. 125 of our brief. In this matter of errors we admit counsel is right. Of the 34 instances cited by us 13 are clear errors and 4 are errors only in the sense that they do not substantiate our statement that they show *no* straight time worked. As a matter of fact they show that the workman is allowed overtime before he has worked

his *full* 8½ hours of straight time. These latter instances are:

Aug. 30, workman No. 100; and Sept. 16, workmen No. 355, No. 512 and No. 538.

Counsel's list correcting ours is wrong as respects the Sept. 22nd time of workmen No. 325 and No. 568. The fact that these men worked *only at night* 10 hours and 8 hours respectively, does not affect our contention that they are not shown to have worked *for our account* their appropriate 8½ hours of straight time. Counsel says of our *correctly* cited instances that they do "not prove that the men had not worked straight time, because if a man worked his straight time on *another job* and overtime on the Hilonian, only the overtime would appear on the sheet". This, the court will see, is the very point of our contention, and that it represents the true status of appellee's quantum meruit charge as regards both ship and shop work, irrespective of our erroneously cited instances, is shown by the testimony of Adamson and Curtis cited at pp. 123 and 125 of our opening brief. (The word "*ship*" found on the 16th line from the bottom on p. 123 of our brief should read "*shop*".) If counsel's answer on this matter of overtime had been to reiterate Curtis's defense; "*The explanation was made and settled with the timekeeper*" (V, 1559), we submit there would have been more point to it.

The fact that Putzar "*separately entered*" on his sheets a man's straight time under one job number and overtime under another, counsel says, is "*con-*

*clusive proof that he was not copying the cards, because each man's card carried upon its face both his straight and overtime''.* We do not think counsel has expressed himself quite as clearly as he might in making this statement. He certainly does not mean that Putzar did not *copy* the cards onto the time sheets.

Any such idea is distinctly repudiated by the record. Curtis says on his direct examination:

“In this case Mr. Putzar transcribed them onto the sheets and he checked them up on these sheets from his hand book.”

(IV, 1430.)

And again on cross examination:

Q. Do you remember, Mr. Curtis, that you have testified that Mr. Putzar entered the time cards into his time book?

A. Yes, this book here.

Q. Is that correct?

A. This printed book.

Q. These time cards having been checked by you and turned over to Putzar as correct were entered by Putzar in the printed time book?

A. Yes, they were entered.

(V, 1510.)

And again:

Q. You ever (never) saw him actually entering the cards onto the sheets?

A. I did at one time, yes.

(V, 1513.)

Furthermore, after the time sheets and time cards had been finally placed in Curtis's hands, they were



checked up by him and found to correspond, and to be without error (IV, 1492). If counsel means that because Putzar separately entered on his sheets a man's straight time under one job number, and overtime under another, there is found "*conclusive proof*" that he was keeping an independent record of the man's time "*because each man's card carried upon its face both his straight and overtime*", we cannot agree with him. If the cards are transcribed onto the sheets, it certainly follows that there must have been transcribed the man's record of straight and overtime, whether worked under the same or different job numbers for, under appellee's system, the card is supposed to furnish such data and the vice of the matter is found in the fact that the apportionment of such straight and overtime is left to the workmen.

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### Admissibility of Putzar's Sheets and the Time Cards.

(pp. 131-134.)

Not only is our contention on this subject relative to the *time cards* met by an attempt to invoke the hearsay rule as it applies to the common law exception of tradesmen's entries made in the ordinary course of business, but counsel has the additional temerity to include Putzar's *time sheets* in such attempt. It is said:

"By this means, the cards themselves and the time sheets are admissible not only because we have proof in the one case of their verity by a party who knew the facts, and in the other case

by proving the signature of Putzar to the sheets, supplemented by the testimony of Mr. Curtis as to the correctness of the sheets, but *also upon the principle that they are in effect the account books of the libelant,—regular entries in the due course of business.*”

Counsel, however, does not stop here with this really remarkable statement, but with a blandness equally astounding contends that this position was taken by him “*at the time the testimony was offered*”.

As regards the time cards, of course, the “*testimony*” here referred to is Adamson’s, for the substantiating reference is Vol. II, 412, where we find the following:

“Mr. FRANK. I object to the entire question upon the ground that it is not a question of refreshing memory at all but it is a question of the regular course of his business, whether or not he passed on those cards, whether checked or not checked at the time they were handed him as he knew them then to be correct.”

This *objection* of counsel’s said to embody his contention of the cards’ admissibility under the exception to the hearsay rule, “*regular entries in the due course of business*”, was not expressed “*at the time the testimony was offered*”, but found utterance during Adamson’s *recross examination* (II, 398) and, as the context shows, was an attempt by suggestion to rescue the witness from an embarrassing position into which he had got himself by his “*check mark*” testimony. The record does not reveal a word suggesting that these time cards were offered as counsel

expresses it: as “regular entries in the due course of business”. On the contrary, appellee’s entire case is built on the theory of Adamson’s *personal knowledge* at the time of the correctness of the time shown on the cards. We have already had occasion to refer to the manner in which Adamson was qualified by counsel to meet this theory and thereafter, when the first of the time cards is presented to the witness, this question is put:

Q. State whether or not you kept this man’s time and checked it up?

(I, 198.)

Later on, during the progress of the case, when we were appealing to the court against appellee’s refusal to disclose the “Hilonian” job numbers, we find counsel stating the purpose and object of Adamson’s time card testimony as follows:

What I am doing is, proving by this witness at this time that the entries on those cards were correct, checked up by him and known to be correct at that time.

(II, 355.)

And again:

Here is a man that has a card which he checks up, and all of his testimony is simply to this effect, that this card is checked up by him every night, and when checked up is known by him to be a correct transcript of the jobs on which the man worked and the time he put on these several jobs.

(id., 359-360.)



We submit the hour is late to change the theory on which appellee's case was tried, or the theory on which Adamson vouched for these cards. Even the discovery of a Circuit Court of Appeals decision, which counsel thinks fits the new contention, would be insufficient justification. However, we will distinguish counsel's newly found case (*Wisconsin Steel Co. v. Maryland Steel Co.*, 203 Fed. 406) by a simple recital of the circumstances under which the statement of law in this case *might have been* made applicable to the case at bar.

It will be remembered that Curtis, in referring to appellee's billheads, said:

A. These headings are the result of the consolidation of the *reports of the work furnished by the different foremen* of the different departments of our yard.

Q. What office do they perform as a record in the office of the United Engineering Works?

A. *They are the original record. It is the only record that we keep.*

(IV, 1428-1429. See also Christy, IV, 1260.)

If, instead of the foregoing, it had been shown, *by one charged with the duty to keep, in pursuance of an established system, an original record in permanent form, showing the time, consolidated or otherwise, employed on a particular job,—such record, though compiled from workmen's time cards, would have been admissible to show such time, and the time cards themselves could have been used as furnishing the requisite "circumstantial guarantee" of the verity of the record.*

This is the law of the case cited and nothing more. Its inapplicability to the facts of the case at bar is too apparent. Neither "in effect" or otherwise are the time cards or Putzar's time sheets the "*account books*" of appellee. On the contrary, the only theory on which the time sheets could be used to establish a *prima facie* case is that they are *declarations against interest*, and we feel some embarrassment in even making reference to a legal truth so obvious.

As to the time cards, if they be not appellee's "*account books*", and if no such books are in fact shown to exist, then we see no reason for changing our previously expressed opinion as to their use being limited to a "*memory assistant*".

Concluding this subject counsel refers to *Miss. Riv. Logging Co. v. Robson*, 69 Fed. 781, in which he says the opinion

*"considers not alone the admissibility of such evidence as the time cards and Putzar's time sheets, but also holds that under the circumstances, they are better evidence than the memory of the workmen themselves."*

This statement is as foreign to what the opinion in that case is directed to as it well could be. The question there was as to the admissibility of certain *books* kept by one of the parties containing data taken from memoranda made by workmen, which data so entered was from time to time verified by inspectors and found to be correct, and thereafter acted upon by the parties and used as the basis of their dealings with

each other. And further, whether these *books* were better evidence of the facts thus recorded than the *unassisted* memory of the workmen themselves. There is no possible analogy between the time cards and Putzar's time sheets in this case, and the *books* referred to in this decision.

Let us refer the court to a decision by Judges Taft and Lurton sitting in the Sixth Circuit, which we believe will be found helpful:

*Chicago Lumbering Co. v. Hewitt*, 64 Fed. 316.

The proof to be made in this case was the lumber contents of certain logs placed in the river above defendant company's boom, from the camp of which a man named McFadden was foreman. The facts are fully stated and show that McFadden testified that at the time in question he was looking after the lumber operations at that point, and that a quantity of logs put into the stream were scaled by one, Foley; that witness's duty was to see that they were scaled in good order; that said Foley kept a tally of his scales on tally boards hung on a wire, and that this tally was kept in pencil and rubbed off at night; that every evening the witness and Foley would sit down and figure up from the tally boards the quantity of logs so scaled during the day, and Foley and the witness set down in a *scale book* the date and total number of feet scaled during the day according to said tally boards; that he examined Foley's scaling sometimes twice, sometimes three or four times a day; that the scale book gives the tally of the logs scaled. Evidence



was also given that tended to show that Foley could not be found so as to obtain his testimony in regard to the scaling. This scale book was offered in evidence on this testimony and received by the trial court over the objection of counsel that it was hearsay. Other testimony of like character as to logs scaled by other scalers was offered and also received over like objection.

Judge Lurton, in speaking for the Circuit Court of Appeals reversing the ruling of the lower court, gives expression to much that is appropriate to the case at bar and, though we commend to the court the reading of the decision in full, we make the following quotations which will point to the analogy shown. In referring to the scale book it is said:

“It is true that the book is one which had been kept by the witness, and the entries offered had been all made by him. But it is equally true that the data upon which those entries had been made had been obtained from another, and that the witness had no such personal knowledge as to the correctness of these data as to enable him to say anything more than that he had correctly recorded the results obtained from data furnished by another.”

And again:

“The difficulty in this case lies in the fact that the book entries were made from the tally board memoranda by a person other than the one who made the tally board entries, and who knew nothing of the correctness of the data transcribed.”

And again:

“Mr. McFadden’s book could not refresh his memory as to the facts sought to be established by his entries for the obvious reason that he had no personal knowledge of the truth of the facts recorded by him. That the book was not admissible to refresh McFadden’s memory is therefore most obvious.”

And again:

“Whether memoranda made by a witness of facts concerning which he had personal knowledge are admissible as independent evidence, or for any other purpose than to refresh the memory of the witness, is a question upon which there is great conflict of authority, and an open question in the courts of the United States. *Bates v. Preble*, 151 U. S. 157, 14 Sup. Ct. 277.”

And again:

“The book involved is not what the common law rule denominates a ‘tradesman’s book’. In no true sense was it a book of accounts at all. At most it purports to contain memoranda made contemporaneously with the fact which they purport to record. That fact is the aggregate lumber contents of the logs placed in the river on each of a series of days from a lumber camp above the saw mills of the company, for which they had been cut. If admissible as independent evidence at all, it must be, not because the book is technically an account book, but upon some rule making memoranda made by a witness admissible as independent evidence of the truth of the facts thus recorded.”

Reference is then made to *Chaffee v. U. S.*, 18 Wall. 516, where the court in that case said that for the admissibility of such entries the rule required,

*“not merely that they shall be contemporaneous with the facts to which they relate, but shall be made by parties having personal knowledge of the facts and be corroborated by their testimony, if living and accessible, or by proof of their handwriting if dead, or insane, or beyond reach of the process or commission of the court.”*

It added:

*“This knowledge of the party making the entry is essential to its admissibility.”*

It will be noted that in the case at bar the time card entries were not made by Adamson at all. Referring to the argument that Foley could not be found, and that, therefore, the memoranda made upon his knowledge were admissible, Judge Lurton said:

*“So in this case Foley was a competent witness to the correctness of the memoranda shown by the tally boards. Did the book kept by McFadden become competent independent evidence because Foley could not be found and produced as a witness? There is nothing, when rightly understood, in either Chaffee v. U. S. or Nicholls v. Webb, which will justify such a conclusion.”*

And again:

*“Now, if McFadden had made these entries from his own personal knowledge, the book might have been competent evidence for the plaintiff upon evidence of that fact, and of the further fact that he was ‘dead or insane, or beyond the reach of the process or commission of the court’.”*

\* \* \* \* \*

*“As the entries were not made by Foley at all, the book not being one kept by him his declarations either written or verbal were incompetent as supplementing a book which he had not kept.”*



And again in conclusion:

“The failure of the appellees to produce Foley was doubtless due to their great laches in bringing this suit; several years having elapsed after their action accrued before this suit was begun. Their negligence should not operate to place their adversaries under a disadvantage consequent upon being subjected to the effect of hearsay evidence.”

While the facts of this case are not directly analogous it will be seen by a process of transformation that some of the points are very helpful to a proper determination of the law of the case at bar. If the theory of the admissibility of the time cards was not based on them as a “*memory assistant*”, but they had been introduced as *independent* evidence, then the case is squarely in point both as affecting Adamson’s exhibits and the cards introduced through the medium of Curtis. It will, therefore, be in order to refer briefly to the extent to which this last witness’s testimony meets the legal requirement.

Curtis identifies the handwriting of *some of the cards* of 9 of Adamson’s men as follows:

David Doig, Jr. (in Alaska), 3 cards out of 15, Adamson’s Exh. 63, 64, 65. (IV, 1441.)

G. W. Higgins (unable to locate), 1 card out of 4, Adamson’s Exh. 19. (IV, 1453.)

Dunne (in Europe, told so), 1 card out of 3, Adamson’s Exh. 77. (IV, 1453.)

Furman (unable to locate), 3 cards out of 15, Adamson’s Exh. 107, 117. (IV, 1454.)

Holmquist (unable to locate), 1 card out of 2, Adamson's Exh. 112. (IV. 1454.)

Reade (unable to locate), 2 cards out of 2, Adamson's Exh. 122. (IV, 1454.)

Albers (unable to locate), 1 card out of 3, Adamson's Exh. 137. (IV, 1454.)

Williams (unable to locate), 4 cards out of 11, Adamson's Exh. 127, 128. (IV, 1454.)

Wm. Schmidt (in Peru, told so), 5 cards out of 16, Adamson's Exh. 94, 95, 96. (IV, 1453.)

The following is a resume of Curtis's testimony relative to the cards of men *not* mentioned by Adamson, but offered solely upon the witness's knowledge of their handwriting:

Chas. Linde (in New York). (IV, 1437.)

O. Haglund (weak minded). (IV, 1443.)

John Knight (dead). (IV, 1445.)

P. Larsen (unable to locate). (IV, 1446.)

Chas. Vaccarez (in Alaska). (IV, 1447.)

Jas. Noleroth (in Los Angeles). (IV, 1448.)

Jack Dominick (no showing), (IV, 1447.)

Ed Smith (unable to locate, and card not in Smith's handwriting). (IV, 1450.)

Joe Perry (unable to locate). (IV, 1451.)

Lastly, we submit under this head, that the use or admissibility of the time cards should in this case be governed by the state law. Although this suit was

brought in a court of admiralty it could, with equal propriety, have been brought as a common law action in a court of the state, in which event the state law governing the use or admissibility of these memoranda would have been followed. As, however, appellee has seen fit to take the matter into a federal court of admiralty, there seems no good reason why such court should not apply to the controversy the same law the state court would have applied, especially if it be found that there be no federal rule repugnant to the state rule. Were this action brought as one at common law in the federal court, the law of California would, of course, be followed (see Revised Stat. §721), and we submit it still should be followed in admiralty where the sole contention is the determination of the value of work done under a contract made in the state by residents of the state. The only California statute governing the use to which memoranda of a fact sought to be proved can be put, is found in §2047 of the Code of Civil Procedure, which reads:

“A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So, also, a witness may testify from such a writing, though he retain no recollection of the par-



particular facts, but such evidence must be received with caution."

From this it will be seen that under the law of this state these time cards are not admissible as independent evidence, and can only be used by the *writer* of the card to refresh his memory. Though, if the writer of the card retains no recollection of the particular facts, he may still testify from his memorandum, but such evidence must be received with caution.

In this case the cards were not written by Adamson or under his direction and they, therefore, under the law of this state, could not have been used by him, much less introduced through him as the medium, as independent evidence of the facts to be proven (see *Stewart v. Morris*, 88 Fed. 461).

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### **Appellant's Proof of Value of All Repairs.**

(pp. 134-143.)

If we may assume that this court sustains our contention that there was a contract for doing the specification work, and thereby necessarily finds that the disputed Schedule '1 is compounded of such contract work and quantum meruit work, which appellee failed to segregate though requested to do so before suit, and that as a result appellant has been forced through the exigency of this litigation to not only perform the task of making such segregation but of valuing the

quantum meruit work so segregated; then, we reiterate what was said in our opening brief at p. 181: "That under the circumstances libelant's criticism of respondent's proof of value" should not find favor. Were there the slightest merit in counsel's criticism a conclusive answer would be found in that part of our brief which counsel does not deign to notice (pp. 176-181). But the criticism of our experts and of our manner of proving the value of this work is without merit. Counsel seems to have some premonition along these lines for we find him, after referring to our suggestion that appellee's case as to values be proved by experts, as an invitation to enter upon "a guessing contest",—launching into a eulogy of both Gray and Curtis in an attempt to qualify them as experts on the question of the reasonableness of the bill. Counsel's references to substantiate the contention that he has introduced the evidence of better qualified experts than appellant's is worth while examining:

Q. Now, Mr. Curtis, you have been at this work a great many years, have you not?

A. Yes, sir.

Q. And you are familiar with the customary prices for the different articles used and set forth in this bill Schedule No. 1. A. Yes, sir.

Q. State whether or not the prices charged for these several items in Schedule No. 1 are the usual and customary prices charged at this port for that class of material?

A. They were the usual and customary charges in this port at that time.

(IV, 1472.)

Counsel seems to have forgotten that Mr. Hough proved for him that the *material charges* on Schedule 1 were usual and customary, and that we did not attempt a word of cross examination on that subject, thereby practically admitting the matter.

We submit that counsel's substantiating evidence with reference to "*expert*" Curtis, was not worth the time taken to refer to it.

As to counsel's reference to Mr. Gray's testimony: "That in their (his) opinion the amount charged in the bill was a reasonable charge for the work performed", we find that it consists of the following, brought out on *our cross examination*:

Q. As a matter of fact, Mr. Gray, you have felt all along that your bill was high, have you not?

A. I felt that the bill was just under the conditions.

Q. You have felt that it was high, have you not?

A. For the length of time the work was done in the bill is not too high, the amount of work that was done in that period of time.

(VII, 2466.)

May we here be permitted to add some further testimony on the subject of expert Gray's opinion, Gray being the only member of the United's triumvirate who, when appealed to by Hough with the request: "You fellows leave me alone", replied: "*I am helpless. I have nothing to do with the case*" (IV 1390).



Klitgaard, Gray's friend, though our expert, testifies:

Q. Mr. Klitgaard, did you at any time ever discuss with Mr. Gray the value of the work which was done at this time?

A. Oh, yes, on several occasions.

Q. Was that before or after the controversy arose?

A. This was long before.

Q. Before the controversy? A. Yes, sir.

Q. What was the discussion?

A. As regards to how much the bill would be.

Q. What was Mr. Gray's opinion in that matter?

A. He thought it would go up to about \$20,000, and was very much worried about it.

Q. He was worried about it?

A. Yes, sir, because the bill would go so high.

Q. That is the entire bill, \$20,000?

A. Yes, sir.

(VI, 2010.)

Subsequently Gray takes Klitgaard for an automobile ride and Klitgaard tells him what his estimate is (made for the appellant after suit was brought) and he, Gray, "*made no comment on it at all*" (Gray, VII, 2465, 2466).

So much for *appellee's* expert testimony.

Turning now to appellant's, we are informed in one breath that neither Gardner nor Heynemann had any "*knowledge of what the work was that was performed*", and in the next that "all their knowledge upon the subject was derived from what they could see of the *completed* work, and what they could not see was explained to them by Mr. Kinsman". This

apparent contradiction is explained by further saying that: "What they could see was only *finished work*", and "What was explained to them by Kinsman is hearsay purely".

Surely counsel is not purposefully forgetful of the fact that the basis of Gardner's and Heynemann's days of examination of this work was appellee's own billhead enumerating in exact detail everything that was done and charged for in Schedule 1. Each of the 140 items of this billhead received their personal inspection and, in cases where the item under investigation was covered up, the nature of the work was explained to them by the man who was present while it was being done. This, we submit, was not hearsay.

Is counsel also forgetful of the testimony of appellee's own foreman, Nelson, as to the distinguishability of this work, even at a date many months after Gardner and Heynemann's inspection of it? (opening brief, p. 191). The fact that what they saw was "*finished work*" is the very reason for the accuracy of their estimate. A man so situated, says Gardner, "*has an advantage in that there is no necessity for making allowances for unforeseen contingencies, which is usually allowed in making an estimate before the work is performed. You really do not know in many cases what will be necessary. The work having been performed, it is very evident what has been necessary and what has been performed*" (VI, 2223; see also Heynemann, VI, 2049). This reasoning appeals to us to far outweigh in its logic and reasonableness

all that was said in way of a contrary view by Mr. George Dickie whom counsel dignifies, we believe erroneously, with the gratuitous eulogy of having a national reputation. (He is confusing the two brothers for, to our knowledge, it is *Mr. James Dickie*, for nearly a quarter of a century the superintendent of the Union Iron Works, who is possessed of national reputation.)

Gardner's view on this subject is clearly to be inferred as the view taken by appellee itself, for Mr. Christy on cross examination, in referring to the itemized billheads, such as Gardner and Heynemann had in this case to guide them, makes this gratuitous statement:

*"In so doing it we have these headings filled out of the actual work performed, and that is the record we try to keep—what is actually performed; not what a man originally proposed to do but what he ultimately is compelled to do through the various differences between the opinion of the man who wrote the specifications before he dismantles an engine and the actual results after it is dismantled."*

(IV, 1263.)

Counsel's position all through has been along the lines here suggested by Mr. Christy,—emphasizing the difference between the situation *before* the engine is dismantled and the actual results *after* it is dismantled. Yet we find two of appellee's experts differing radically from this position and declaring that there are better facilities for arriving at a correct estimate by an examination before the work is done than by one after it is done (Dickie, VII, 2565; Ransom, VII, 2587, 2588).



While the third expert says that in both situations the estimates are valueless (Hopps, VII, 2551).

Were the opinions of these witnesses to be adopted, the vessel owner would be deprived of all means of checking the value of the work of a shop if it was disputed. As counsel says that the "circumstances attending the calling of Mr. Hough makes his testimony upon the subject of peculiar value" (p. 142), we will be excused for quoting from it.

Q. Now, Mr. Hough, referring to the examination that you have undergone by Mr. Frank, do you mean to put yourself on record as saying that competent engineers, marine engineers, cannot, after having seen the work of repair which has been done on a vessel, estimate the value of that work?

A. No, sir; I do not.

Q. Is it not done every day? A. Yes, sir.

Q. Is it not the only means that your principals have of determining the value of work?

A. That is one of the means; yes.

Q. Is it not the most accurate means of determining the value of that work after it has been done, inspecting the work and accepting the opinion of experts?

A. I would not say it was the most accurate means. It is a means of checking.

Q. A means of checking what?

A. The cost of a piece of work as represented by the contractor.

Q. That means is resorted to a great deal, is it not?

A. In the case of experts.

Q. The use of experts in checking the work and the price of work paid by a contractor?

A. Where there is any question as to the value of the work, but it is not the custom to call an expert to state the value of every piece of work done.

Q. But where there is a question, that is the means of checking the work, is it not?

A. That is the means; yes.

Q. Is it not the most accurate means of doing so?

A. I know of no other.

Q. You know of no other more accurate?

A. I know of no more accurate means than employing the best man I can find to know of that particular class of work.

Q. And show him the work, telling him what was done, and letting him see what was done as far as it is possible to see it and taking his estimate. That is the most accurate means of checking the work, is it not?

A. It can only be accurate provided that that man is shown all that is done.

Q. I say it is the most accurate means of determining the value of that work?

A. I think so; yes.

Q. *If that means did not exist and was not recognized, there would be no way of checking the work of a shop if it was disputed?*

A. *No, sir, I suppose not.*

(IV, 1381, 1382.)

The subject can be dismissed with but one further word. In this case the work *had been completed* before the controversy arose, and its examination *as completed work* by experts was the only means left open to appellant to dispute the correctness of appellee's bill, and yet this court is asked to ignore the means employed on the ground, first, that an estimate on completed work has not the same degree of accuracy

as an estimate made before the work is done, and second, an estimate under either situation is valueless. The result being that appellant, having no means of proving the incorrectness of the bill, must submit to it. The very statement of the consequences resulting from counsel's contention is so repugnant to one's sense of equity that it would almost seem an affront to make it in a court of admiralty. We do not criticize counsel's right to malign and discredit our experts and their work, but to say that a situation brought about by appellee's repudiation of its contract, as appellant claims, forbids recourse to the *only means* of rectifying the wrong is abhorrent to our conception of the principles which actuate this court.

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### Costs.

There is little to add to what has gone before on this subject. Counsel refers to the length of our cross examination, to which we might respond that his own cross examination was by no means meagre. Our cross examination was in no sense a fishing excursion or full of any improper inquiries, as we think the court will find. We also emphatically deny that the long delay from November 18th to May 1st was caused by us. We were not trying the Moore divorce case during that period (which was concluded early in December) and were only responsible for a small part of the delay. The case should have been closed long before November 18th and would have been but for the dila-



tory tactics pursued by the libelant and the cumbersome method in which it put on its case. If such a method of trial is to be pursued in future suits for work and labor it will, as suggested in our main brief, swamp the machinery of justice. The only way it can be stopped is by taxing the costs against the party responsible for it and, with all due respect to the lower court, we submit that there was a grave abuse of discretion in not so doing in this case.

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### Interest.

Counsel tacitly admits that interest is not allowable on a quantum meruit claim before judgment in California in ordinary cases. He says, however, that we admit that \$19,568.32 is due on his quantum meruit claim and should, therefore, pay interest on this sum. This is a mere juggling with words. Our admission was that \$19,568.32 was due on *both* contract and quantum meruit work, and is based on the theory that there was a contract. If the court finds that there was a contract we might have to pay interest on the contract price, but, if the court finds that there was no contract, our admission goes for nothing. Moreover, in practically every quantum meruit case there is an admission that at least something is due, yet interest is never allowed because the exact amount cannot be ascertained till judgment is rendered. No case can be found supporting this novel proposition now advanced for the first time, and we feel that there is no need to answer it further.

We also submit in this case, however, that even if the court finds that there was a contract, no interest should be awarded for two reasons: (1) that libelant has not sued on the contract but on a quantum meruit, and (2) a proper tender was made based on the theory that there was a contract. It is true that the amount of the tender was not paid into court, but we again submit that a tender is inappropriate in a case where respondent denies the whole theory on which libelant's claim is based.

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### Appendix I.

(pp. 1-60.)

The purpose of this appendix, other than to enlarge the printer's bill, is not apparent. It purports to be a "segregation of labor and hours worked and material used, together with a resume of Putzar's time sheets". If the "segregation" had been made applicable to the individual job numbers, or had been made so as to distinguish between contract work and extra or quantum meruit work, it might have been of some assistance, and such a segregation could have been as easily accomplished, but in its present form Appendix I is of no value for, if the court takes appellee's view of this controversy, it will govern itself by the pleadings and the record and not by this gratuitous ex parte appendix, which appellant has never seen before and which, in the absence of any statement of counsel's as to its materiality, we decline to examine or discuss. An examination of it may or it may not substantiate its title and, if it does, pray what of it?

## Reply to Appendix II.

(pp. 61-80.)

This appendix is appellee's reply to sundry irregularities pointed out in our opening brief, and starts out with the statement that they are, "*with very few exceptions*", unfounded. It would have been helpful if these "very few" *admissions* had been pointed out.

The court will bear in mind that most of the irregularities are referred to by us as showing that Putzar did not keep an independent record of time (opening brief, p. 114).

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*Wheel work and valve work on Sept. 10th* (opening brief, 114; reply brief, 122-125).

Our criticism is directed to the contention that it was impossible for the work shown by Putzar's time sheets to have been done on the "Hilonian" wheel on Sept. 10th. Counsel, however, fails to catch the point, namely: that even though there might have been performed by the appellee 10 hours of straight time and 6 hours of overtime on wheel work (opening brief, 114), still, for such time to appear on Putzar's time sheets on Sept. 10th is evidence that he was not keeping an independent record of ship time, for on Sept. 10th it would have been impossible for that amount of work to have been performed on the *ship* and, if performed elsewhere, how is it that the time appears on Putzar's sheets?



(2) Sept. 14. W. Ross—*Allowance of 12 hours when it should have been 15* (opening brief, 118; reply brief, Appendix 2, p. 61).

Appellee's answer is characteristic: Putzar did not correctly copy the time cards; the workman's card "*must have shown 15 hours*". We reply that he *did* correctly copy the card, for Curtis subsequently checked Putzar's time sheet copy work with the card and found them in harmony. Since appellee, after this checking, has deliberately *destroyed* the time cards, we can hardly express our admiration of counsel's presumption in saying "*the card must have shown 15 hours*".

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(3) Sept. 15. L. K. Siverson, No. 508 (opening brief, 119; reply brief, Appendix 2, p. 62).

Appellee's reply to our criticism under this head is as incomprehensible as it well could be. As showing that Putzar's was copy work, we point to the fact that on Sept. 15 Siverson is allowed 10 hours straight and 4 hours overtime on rudder work and 9 hours straight time on work on valves. Counsel's reply is: "*The 9 hours last mentioned were put into the wrong column. The 9 hour entry on valves should have been in the total column.*" We regretfully confess our inability to enlighten the court as to what counsel means.

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(4) Sept. 17. *Duplication of sheet 70 on sheet 73* (opening brief, 119; reply brief, 62).

Here counsel admits the overcharge and says appellant should not complain because the trial court

gave it credit for the duplicated time. This matter of having received credit for the duplication was not the point of our criticism, which was that it is inconceivable that an error of this magnitude could appear in the time cards of the men, and also in Putzar's independently kept hand book. To this criticism counsel remains mute.

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(5) *Sept. 20. Sheet 73, Nelson night work* (opening brief, 119; reply brief, 62).

Our criticism is that this foreman is allowed 26½ hours of actual work in one night. Appellee's reply is that Nelson worked 8½ hours at *night* (Sheet 80) and that 4 hours overtime shown on Sheet 80, and the 14 hours overtime shown on Sheet 78, were *overtime day work*.

In the first place, Nelson was the *night foreman*, and nothing in the record suggests that he did anything in the day time. On the contrary his own testimony clearly points to night work only (IV, 1185, 1186). Secondly, counsel's attempted explanation, while being entirely gratuitous, is based on an assumption that Curtis's copy work is inaccurate, for both Sheets 78 and 80 show on their face that the 14 and 4 hours respectively of overtime were for work "*all performed in one night.*"

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(6) *Sept. 21. P. McUrney, No. 150* (opening brief, 120; reply brief, 63).

Our criticism is that appellant is charged with 20 hours straight time and 8 hours overtime in one day.

the reply is again characteristic as being based on matter not appearing in the record: "The men worked 10 hours on the 21st *during the day* and worked for 13 hours *that night*, making a total of 23 hours." The time sheets do not show any night work on the 21st of September. Furthermore, if we should adopt counsel's suggestion and put the 10 hours into the overtime column, we have this result: 8½ hours straight time and 18 hours overtime (not 13), or a total of actual work of 26½ hours on September 21st. Counsel will have to explain again.

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(6) *Sept. 21. J. Finson, No. 190* (opening brief, 120; reply brief, 63).

Our criticism is that appellant is charged with 22 hours straight time in one day. Counsel's explanation is entirely outside the record, and we regret therefore our inability to discuss it.

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(6) *Sept. 21. William Eader, No. 212* (opening brief, 120; reply brief, 63).

Our criticism is that appellant is charged with 14 hours of straight time in one day. Again counsel's explanation is gratuitous and unintelligible.

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(6) *August 28. F. Paoli, No. 176* (opening brief, 120; reply brief, 64).

Our criticism is that appellant is charged with 18 hours of straight time in one day. Again counsel explains outside the record.



(6) *Sept. 14. W. Schmidt, No. 318* (opening brief, 120; reply brief, 64).

Our criticism is that as this workman is allowed 10 hours of straight time, and 16 hours of overtime, appellant is called upon to pay for the obviously impossible, namely:  $24\frac{1}{2}$  hours of actual work performed in one day. To this counsel makes an "explanation" agreeing with our criticism precisely, but mars somewhat the harmony by attributing to appellant the "*mistake of not doubling the overtime*". We will have to leave it to counsel to further explain what is meant by this.

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(6) *Sept. 14. Workmen Nos. 355, 517, 536* (opening brief, 120; reply brief, 64).

Our criticism is that it seems almost incredible that a workman can put in  $23\frac{1}{2}$  hours of actual work in one day. Appellee's reply is that there are times when one man has worked "*as much as 48 hours actual time*", and then Curtis is appealed to for confirmation. He says: "*I have seen men work three consecutive days without sleep*" (V, 1573). We still express our scepticism. However, if Curtis is right, we wonder what kind of work a man is doing at the end of the 48 hours—is it such as should be counted as a part of the legal proof of the reasonable value of the completed work?

(6) *Sunday, Sept. 12. C. Schmidt, No. 355* (opening brief, 121; reply brief, 65).

Our criticism is that it seems almost incredible that this workman could have worked on Sept. 12th 17

hours, Sept. 13th 23½ hours, and Sept. 14th 23½ hours of *continuous actual work*. Counsel's reply is: "Nothing unusual".

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(6) Sept. 20. *H. Nelson* (opening brief, 121; reply brief, 65).

This criticism, through an inadvertence, is a duplication of the criticism made under No. 5 at pp. 119 and 120 of our brief and, though answered by appellee, it needs no further reply from us.

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(6) Sept. 20. *Workman No. 516* (opening brief, 121; reply brief, 65).

Our criticism is that appellant is charged with 14 hours of straight time in one day. Counsel's explanation is again characteristic as being entirely outside the record.

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(6) Sept. 20. *Workmen Nos. 375, 570, 505, 567, 568 and 513* (opening brief, 121; reply brief, 66).

Our criticism is that appellant is being called upon to pay for time obviously impossible, namely: 24½ hours of *actual work in one day*. Counsel's reply is along the same harmonious line of agreement as in the case of "Sept. 14, William Schmidt, No. 318",

except that instead of marring the harmony, as done under that heading, by attributing to appellant a "mistake in not doubling the overtime", he says that there is "*nothing unusual*" in our criticism, that is, nothing unusual in a man working 24½ hours in one day.

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(7) *Charges for ladders, floors, floor plates* (opening brief, 121, 122; reply brief, 66, 67).

Our criticism is that the charges are covered by contract Schedule 5 of the libel (I, 37). Counsel's reply is a denial. The limits of this reply brief will not justify a further discussion of the matter which would necessarily be long.

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(8) *Francis Dolan, foreman pattern maker* (opening brief, 122; reply brief, 67-68).

Our criticism is that if Dolan and his men did work on the ship, and Putzar was keeping an independent record, such record would show the time of Dolan and his men and, therefore, appear on the time sheets. Counsel's answer is that the "*major portion*" (gratuitous) of the work of the pattern makers was in the shop, they had always been considered shop men and their record kept solely in the shop. That is just the point. Their cards, *although* doing work on the ship which Putzar should have kept track of, were never turned over to Putzar as ship cards, and, therefore, they are not to be found on his time sheets.



This reply brief has extended to a length not dreamed of when it was commenced, and we shall hasten its close by reference to but two other matters, omitting an answer to the several small matters contained at pp. 68 to 73 of reply brief referred to at pp. 127 to 130 of our opening brief.

Counsel's frequent references to libelant's Exhibit Schedule No. 2 (VII, 2688) in attempting to discredit Klitgaard is, we think, fully met by Klitgaard himself in his redirect examination found in VI, 2001-2012.

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### Running Power House at Night.

(Opening brief, 130; reply brief, 73.)

Our criticism was that Schedule 1 shows an overcharge of 6.9 days of 15½ hours each at \$1.50 per hour, and in making it, we requested that counsel explain the trial court's ground of refusing to recognize this overcharge. This counsel does not do, but instead advances a new theory that the charge of 30.9 days for "*running power house at night*" (see Schedule 1, I, 31) covers time when the power house was run in the *day time*, offering the further gratuitous suggestion that light is furnished to the ship not because it is night time, but because the hold of the ship is dark both day and night, and whether it be day or night light must be furnished therefor. This *day time* contention will be seen to be a direct refutation of the wording of appellee's own bill: "*Running power house at night*". The evidence

offered in this case, if properly offered, is intended to meet the issue made by the pleadings. In this particular instance the sole issue is the charge for "running power house *at night*".

The evidence, as bearing on *this* issue, consists, as we view the matter, of Putzar's time sheets showing the number of nights work was done on the "Hilonian", and Ferro, the night power house engineer's testimony as showing the number of hours on those nights the power house was run for the "Hilonian". Ferro testified that his was night work running the engine that furnished the lights for the ship (IV, 1310), and on cross examination we find this:

Q. You are quite clear, are you, Mr. Ferro, that when work at nights ceased on the ship then your work ceased in the power house?

A. Yes, sir.

(IV, 1325.)

In our opening brief on this subject we were not particular in our statement of the *exact* number of hours the power house was run at night, but we shall now furnish that *exact detail*.

Putzar's time sheets show that night work was done on the "Hilonian" on the following days only: 8 days in August (24th to 31st, both inclusive), and 18 days in September (1st to 8th, both inclusive, 10th to 18th, both inclusive, and the 20th), or 26 days in all (mistakenly stated in our opening brief as 24 days). Turning now to Ferro's time cards covering 25 of these days, and Linde's card of Sept. 4th covering the night that Ferro was absent, we find, *including the bonus*

*half hour paid to the engineer when he was not working*, the time shown by these cards to be 390½ hours. Three of these cards also show that the power house was run in the joint interests of the “Hilonian” and another ship, yet the “Hilonian” in each instance is charged *full 15 hours*, and we presume the other ship also. (Cards of Aug. 26th, str. “Plant”, 15 hours; Aug. 27th, str. “Plant”, 12 hours; Aug. 31st, str. “Buckman”, 14 hours).

Another interesting feature is disclosed by an examination of Ferro’s cards, and that is that appellant has been charged with this *night engineer’s services* for running the power house at night on *Sept. 9th, 19th and 21st*, days on which *no night work* is shown by Putzar’s time sheets to have been done on the ship, and the aggregate of the hours so improperly charged is 90. Counsel would meet this showing not only by going outside the record and claiming that the bill for running power house at night includes running it in the day time, but further digresses by referring to Appendix 1, pp. 50 and 51. We have said that we declined to examine this appendix but, when we read counsel’s reference to it under this heading, we relented with the result that we find it is impossible to tell from what counsel has taken the data placed on these pages. Certainly not from anything in the record unless from Ferro’s time cards, and, if from these, then the data are incorrect, as for instance: Ferro’s cards of Aug. 26th, 27th, 31st, and Sept. 1st and 3rd, when compared with the showing made covering the same dates on p. 50 of the



appendix, show gross inaccuracy. If this criticism is well taken what can be said of the balance of Appendix I? Before dropping this subject, we also wish to call the court's attention to the provision of the specifications, requiring the appellee to furnish the lights used on the ship *free*; in other words, as a part of the contract price for the repairs (VII, 2642).

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### David Doig's Time Cards.

(Opening brief, 130; reply brief, 73.)

The defense which is intended to meet our attack on these cards is no more remarkable than many others which we have pointed out, except its futility is a shade more apparent. Although it is not stated in so many words, appellee's only possible defense of them necessarily depends upon an extension of the hearsay rule to limits never before heard of. We do not refer to the defense contained in the reply brief, for that is so palpably refuted by a simple reference to the evidence referred to that, in oral argument, counsel avoided reference to it and rested upon the assertion that the propriety of the cards as part of the record was made manifest through the "*clerk's*" *endorsement* found on their back. In other words, this endorsement is the warrant for the cards' introduction as proof of David Doig's time. Appellee is, therefore, showing as part proof of the reasonable value of this work several hundred of hours of time by the mere introduction of unidentified memoranda,

the correctness of which depends solely upon the unsupported statement of the memoranda itself.

Furthermore, we cannot pass unchallenged the basis upon which counsel's defense of these cards rests. It is said they bear the endorsement of the clerk as evidence of their introduction. This statement is not correct, and is further indicative of the desperate straits to which counsel is put in defense of this incident. Every word of testimony in this case was taken before a commissioner. We make no point of distinction between such commissioner and the clerk as regards the power of endorsement of exhibits properly *offered*. Nor do we raise any question as to the endorsement of the other exhibits in this case where the record *shows them to have been offered in evidence*. However, we do contend that in this case not a single exhibit contains the endorsement of either clerk or commissioner. Through the courtesy of the commissioner, and to meet the convenience of counsel and witnesses, all the hearings were had at the offices of respective counsel in the Merchants Exchange Building, and the method pursued was to have the commissioner attend such of the hearings as was necessary for the purpose of swearing the witnesses, sometimes as many as half a dozen being sworn at a time, after which the commissioner would retire. If, in the course of a witness's examination, exhibits were offered by either party, the then acting *stenographer* would place upon such its appropriate mark of designation.

These David Doig cards were certainly not offered in evidence *before* David Doig testified, and they were certainly not offered at any time *afterwards*, for David Doig's *evidence* showed that the testimony of the time-keeper, Sjoberg, in whose handwriting the cards are, *was the necessary prerequisite to their introduction*, and Sjoberg was never called.

As counsel does not contend that their presence in the record is a mistake or an inadvertence, the only alternative left is to await his showing of the volume and page of the record where these cards were introduced. At the close of the oral argument this was what counsel told the court he would do and we shall await with interest his performance in that respect.

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We submit in conclusion that the appellant has clearly proved a contract in this case, and that hence appellee cannot recover on a quantum meruit under its proof, no segregation of the contract and quantum meruit work having been made. Even, however, if there was no contract, we submit that appellee's quantum meruit proof is deficient in so many respects as to leave the court no alternative but to take appellant's figure of \$22,922.56 as the sole possible basis of recovery.

Respectfully submitted,

— E. B. McCLANAHAN,

S. H. DERBY,

*Proctors for Appellant.*





No. 2251

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

MATSON NAVIGATION COMPANY

(a corporation),

*Appellant,*

vs.

UNITED ENGINEERING WORKS

(a corporation),

*Appellee.*

## ADDITIONAL BRIEF FOR APPELLEE.

NATHAN H. FRANK,

IRVING H. FRANK,

*Proctors for Appellee.*

Filed this..... day of January, 1914.

FRANK D. MONCKTON, Clerk.

By..... Deputy Clerk.





No. 2251

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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MATSON NAVIGATION COMPANY

(a corporation),

*Appellant,*

vs.

UNITED ENGINEERING WORKS

(a corporation),

*Appellee.*

## ADDITIONAL BRIEF FOR APPELLEE.

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In our original brief, we had occasion to comment upon some acts on the part of appellant of a questionable nature. We also had occasion to comment upon the manner in which testimony was presented to this Court, as unfair.

These matters are unexplained and unexplainable.

Appellant, therefore, attempts to minimize them and assumes the position of virtuous humility, under what he is pleased to term "personalities", hoping thereby

to induce the Court to refuse to give weight or consideration to the said incidents. For our own part, we have no taste for personalities, but when they are so involved in the facts of a case as to give character to those facts, they are as necessary to be considered as any other elements in a case. If our suggestions are not justified by the record they are unworthy of us, but, if justified by the record, no "ducking" or plea that such conduct is unethical, will answer the purpose. We justify our present conduct by observing that it is in accord with the instruction we received from a man whose ethics at this bar were unchallenged for more than a generation, and under whose careful and friendly eye we received our training. Under the facts of this case any other course would prove us unworthy of our calling.

That appellant has not hesitated to make personal attacks, covert and otherwise, when it suited his purpose, is shown, not only by the brief, but by the entire record of the trial, and he only disparages such conduct when the record is so clearly against him, that he has no other recourse. In this connection we now specifically call attention to the charge respecting

## DAVE DOIG'S TIME CARDS.

That he should catch at a straw in an attempt to brand us with his own peculiar failing, does not surprise us, but the very means he adopts for this purpose, only serve to strengthen our criticism of his methods for which, in other connections, we have taken him to task.

In connection with DAVE DOIG'S TIME CARDS, he makes a personal attack upon counsel, it being directly charged that we surreptitiously slipped that exhibit into the record without having produced it regularly at the hearing for that purpose.

At the argument, we were taken by surprise, and of course had not the time to examine the voluminous record so as to refute the charge. We did, however, call the Court's attention to the fact that the cards were properly endorsed, and promised to point out the volume and page of the record where these cards were introduced.

In order to avoid the evidentiary effect of the *endorsement* of the cards, as proving the regularity of their admission, appellant now states that we "rested upon the assertion that the propriety of the cards as part of the record, was made manifest through the '*clerk's*' endorsement found on their back" (reply brief, p. 115). He then devotes a whole page (116) to show that the *clerk's or commissioner's* endorsement is not such evidence, because, when "in the course of a witness' examination exhibits were offered by either



party, the then acting *stenographer* would place upon such its appropriate mark or designation."

We do not recall having used the word "clerk's" endorsement, at the hearing. But whether we did or not, we then knew, as well as appellant knew, that it was the stenographer's (Mr. Clement Bennett's) endorsement, that verified the exhibits, and *it is his endorsement which the exhibit in fact bears*. Had counsel not been blinded by his hot-footed desire to charge us with an attempted fraud upon the Court, he would have looked at the endorsement on the card before committing himself to the distinction between the "clerk's" endorsement and the "stenographer's" endorsement. Had he done so, he would have been convinced that the endorsement was in the stenographer's handwriting, and not in the clerk's. The slightest comparison of that endorsement with the other endorsements on the exhibits, would have confirmed this.

But, now, with reference to the record. It is said (reply brief, p. 117):

"As counsel does not contend that their presence in the record is a mistake or an inadvertence, the only alternative left is to await his showing of the volume and page of the record where these cards were introduced. At the close of the oral argument this was what counsel told the Court he would do, and we shall await with interest his performance in that respect."

Look at Vol. IV, p. 1416, where the following appears:

“Mr. FRANK. We also offer the cards of Mr. Dave Doig, on which he was examined and ask that they be marked Dave Doig Exhibit No. 1.

Mr. McCLANAHAN. I object to the offer of the cards on the ground that they are incompetent, irrelevant and immaterial, hearsay, self-serving and not binding on the respondent, and ask that my objection apply to each card and every card introduced in the exhibit. (The cards are marked ‘Dave Doig Exhibit No. 1.’)”

Again his hot-footed pursuit of his quarry has made him blind to the record.

So far as the legal effect of Dave Doig’s cards as evidence is concerned, we have made our position plain in the original brief, but we shall have something further to say on that subject at the end of this additional brief.

After reading the reply brief, we find nothing that requires our attention save the correction of statements concerning the state of the testimony and of criticisms of our statement of facts, more or less of the nature of the “Dave Doig” attack, which criticisms are a running comment upon sentences in many cases disassociated from the context.

**THE HOUGH INCIDENT.**

The treatment of this incident in the reply brief is specious.

We note with pleasure, and heartily indorse, appellant's suggestion regarding "any attorney who would lend himself to such conduct." We also note the statement that, at the time of the trial our probing into the matter was looked upon as

"being on a par with the tactics of some practitioners in the handling of a jury trial where the incident, admittedly having no bearing on the merits of the case, is elucidated for the purpose of the effect on the mind of some possible man in the jury box. Had we known or suspected that it was going to be used in this case as the basis of a charge of a species of bribery, we certainly would have gone into the matter further by calling Mr. Diericx for substantiation of our understanding of Mr. Hough's retainer," etc.

As to the suggestion that our unfolding this matter is "on a par with the practice of some practitioners in the handling of a jury trial", we have only to point out its use in another connection in the same brief. That use in the two instances is so identical as to make it patent that it is a favorite suggestion with appellant when he is unable otherwise to explain questionable conduct or a bad situation in which he finds himself. But it will not answer in this case. Our long experience with and intimate knowledge of the judges of both Courts is sufficient to make certain that we never dreamed of being able to influence any of them by improper or immaterial issues.



But is such conduct immaterial? It has been urged by appellant, that there are presumptions arising against the United for failure to call a witness which the Matson Company claim we should have called. If such presumption arises from a passive act, are there no presumptions arising from an active attempt to suppress testimony—leaving out of question the admitted criminality of such an act?

And what are we to say of the statement that it was not suspected that the fact “was going to be used in this case as the basis of a charge of a species of bribery,” *as an excuse for not calling a witness constantly at their elbow (Diericx) who would undoubtedly have attempted to refute the charge, had he dared to take the stand?*

The attempt to minimize the nature of the testimony of Mr. Hough upon this subject by the quotations from his testimony set forth in appellant’s additional brief, can find little favor in the face of the direct and conclusive statement of the witness under cross-examination. The substance of his testimony, without qualification, is, that Mr. Diericx applied to him to make an estimate, and that he told Mr. Diericx that such an estimate would be of no value; that it is unsatisfactory; that it is improbable that any one, making an estimate upon repair work that they had not seen, would arrive at correct values unless by guess, and this he declined to do. That *the next day*

“Mr. Diericx asked me, I think, *if I could serve to the extent of not serving the United Engineer-*

*ing Works,—I will not be sure of his words, and I do not wish to misquote him,—and to that extent I would be neutral.”*

Again:

“As I said before, my neutrality would be to that extent where I would not serve the United Engineering Works (p. 1380).”

We do not desire to encumber this brief with extended quotations upon this subject. We have made references in our original brief to the pages of the testimony, and we have no doubt the Court will read the entire examination and draw its conclusion from it as an entirety. After so reading it, it does not appear to us that any one can conclude that appellant did not suspect the nature of the charge we were making, or the use that would be made thereof. Pages 15 and 16 of our original brief sufficiently indicate the application we desire to make of that testimony, and in that connection, we deem it decidedly material.

The suggestion that the charge is puerile, because “the merest embryo would know it to be impossible for the expert to remain bought because of the power of the process of this Court,” is no answer at all. Not only do persons who engage in such transactions overlook the possibilities, but they also count upon the great improbability of the transactions being discovered.

**NINE HOURS SHOP WORK, WHEN 8½ WERE ACTUALLY  
PERFORMED (Brief p. 71).**

Appellant takes exception to our statement that his treatment of this matter is unfair, and tries again to make a distinction between the actual cost of doing the work, and the reasonable value of the work, which necessarily must include the contractor's profit, and contends that the *billing rate* carries a profit. He justifies his use of the billing rate because Gardner says it was a good liberal rate over and above cost and carried a good profit with it. He does not, however, refer to the fact, so thoroughly established by the testimony, that the billing rate only applies to the number of hours as charged *in the bill*, which are *greater* than the actual hours, just because the billing rate is *less* than the true rate. In other words, he still insists upon applying a lowered rate to the actual number of hours worked, instead of the true rate for these actual hours. Mr. Gardner's testimony upon this subject is of no value when considered in connection, not only with his bias, but also in connection with the testimony of every other witness showing that the billing rate is below the true rate.

A repetition of his former contention does not prove it to be fair.

The same applies to his criticism of our answer to his claim respecting overtime.

**WRONG FIGURES ON OVERTIME.**

What fatuity in this connection leads him to paraphrase our argument, "to illustrate the *true* situation" in the following language (Reply Brief, p. 73):



“In other words, respondent is billed for 10 hours’ time at 65¢ an hour, which equals \$6.50. If, however, the *rate* had been doubled, instead of the *time*, the charge would appear thus:

$$\begin{array}{r} 9 \text{ hours at } 65¢ = \$6.50, \text{ and} \\ \frac{1}{2} \text{ hour at } 1.30 = .65, \text{ which} \end{array}$$

being added together = \$7.15”.

*His arithmetic is very bad indeed, for,*

$$\begin{array}{r} 9 \text{ hours at } 65¢ = \$5.85 \\ \frac{1}{2} \text{ hour at } 1.30 = .65, \text{ which} \end{array}$$

being added together = \$6.50,

the same as the billed charge of 10 hours at 65¢.

Can we be blamed for losing patience with one who is continually criticising our statements as inaccurate, and basing his criticisms upon just that kind of verification?

**THE CRANK-SHAFT CONTROVERSY, AND CHANGE MADE IN THE  
REPORT OF THE EXPERTS TO CONFORM TO THE NEW  
THEORY (Reply Brief, pp. 31-35).**

We do not appreciate appellant's answer "*from a legal standpoint*" "that would put an end to the entire contention on the subject".

With regard to the balance of the matter under this heading, we are content to allow it to rest upon what appears in the record and our original brief, and if appellant feels that his explanation destroys the force of our argument under that heading, we will not quarrel with him.

We are only sorry that we cannot agree with him concerning the motive for this change. It does not stand alone upon the record, but receives character from other incidents of a similar nature, to which we have called attention. Since it was open to explanation by both Diericx and Gardner, the *ex parte* statement that they were not called because "on second thought it seemed really an immaterial matter of no consequence as determinative of the issues involved", seems scarcely sufficient to fill the requirements.

How like this excuse is to the excuse for the "Hough incident"!

What transpired between counsel upon this subject is fully set forth in the record, and the colloquy there referred to was of so little importance that the reporter merely noted it, instead of transcribing it.

# DISCREPANCIES IN THE SEVERAL SPECIFICATION EXHIBITS.

In criticising our statement that the only specifications that the executive officers of the United had was the respondent's Christy "C", appellant confines himself to the testimony of Mr. Christy, who is not one of the executive officers of the United, but whose work is confined to the management of the mechanical end of the work. He also introduced colloquies between counsel upon the subject in which it is admitted by counsel for United that the set of specifications then before the parties came from the United's records; that he had produced what counsel for Matson had asked for, to the best of his knowledge, and had produced all the papers that he knew anything about relative to that matter. When pressed for an admission that it was the original, counsel for the United refuses to make such admission, because not advised upon the subject.

Appellant then asks (reply brief, p. 42):

"With this evidence in view, how can counsel have the temerity to say: '*The only specifications that the executive officers of the United had was respondent's Exhibit Christy C*'.

\* \* \* \* \*

"Where in all the record is to be found one word to substantiate the portion of the sentence which we have italicized?"

Why does appellant not include in his resumé the testimony of Harry Paul Gray, *who was the man who received the specifications and made the bid, and who was not present at the time of the colloquy*, but was called on May 1, 1912. (The date is found on p. 2285,



Vol. VI, and the testimony which we shall refer to is found on p. 2249, Vol. VI. The colloquy referred to took place on September 20, 1911; the date is found on p. 1227, the colloquy on pp. 1267-68.)

On page 1266 Mr. Christy says:

“A. I have just told you, I am not in touch with the conditions prevailing with the office records on this side.

Q. So you don't know?

A. I don't know what the city office records are.”

Mr. Gray then testifies as follows (p. 2349):

“Q. I show you now respondent's Exhibit Christy 'C', and ask you whether or not that is the set of specifications that was given to you?

A. Here is the office mark on the thing; that is the only specification that I know anything about.

Q. That is the only specification you ever saw?

A. That I know anything about or that I ever saw. These things go to the office, then they go to me.”

Does this warrant the charge of temerity on the part of counsel, in stating that the only specifications that the executive officers of the United had was the Respondent's Exhibit Christy “C”.

*So, too, with our statement that the specifications, which are presented to the experts, and under which their work is done, is Respondent's Exhibit Saunders No. 1.*

We are criticised for the statement that their work was done under those specifications. In the reply brief it is said that

“counsel must know that our experts did no work on the specifications. He must know that the work was done under an itemized heading of appellee’s own bill, schedule 1, which is reproduced in Kinsman’s Exhibit No. 2” (p. 43).

What, then, will we do with the following examination of his experts by appellant:

“Q. Aside from assuming, Mr. Gardner, that ‘Respondent Kinsman Exhibit No. 2’ is a copy of Schedule 1 in the first 3 pages, you may assume in the further course of your examination, that the paper which I now hand you entitled, ‘*Respondent Saunders Exhibit No. 1*’ is a copy of specifications prepared by the respondent in this case and submitted for bids to the United Engineering Works, the libelant, etc.” (Vol. VI, p. 2206).

And again, on page 2215:

“Q. Now, Mr. Gardner, calling your attention to ‘*Saunders Exhibit 1*’, which is the original contract I have spoken of in my assumptions, do you remember that I asked you to assume that there was certain work changed in that specification, which we have called compensation work? Will you please go over that schedule and tell me if you know whether the second item of specification was performed or not? Read the whole paper to yourself, and answer yes or no.

A. From the information we gathered aboard the ship, we found that this work was not done.

\* \* \* \* \*

Q. What was the work done instead of that?

A. There was a counter-balance cylinder made and installed, which we saw. The valve-stem was lengthened for the purpose of connecting with the piston in this counter-balance cylinder, which we did not see, but it was thoroughly described to us, and the necessary piping we saw, which was used in connecting up this cylinder.

Q. I will ask you if the fourth item of specification was changed?

A. The high pressure and intermediate shoes were not reconstructed, but new shoes were cast and fitted to place.

Q. Examine the fifth item of the specification and answer the same question."

To which he gives answer.

Again:

"Q. Please examine the seventh item, and answer the same question."

To which he gives answer:

Again:

"Q. Examine the fourteenth item and answer the same question."

Again:

"Q. Did you have any information, Mr. Gardner, at the time of first visiting the 'Hilonian' of these changes in the original specifications?

A. Yes, sir, I think I had, and I think my testimony relative to what was furnished me at that time should be corrected in that as I now recall it, *this was also furnished me, a copy of this specification.*"

Again, speaking of item No. 1 in Kinsman's No. 2:

"Q. That is, you consider that it does not belong to any of the specification items, or any of the minor schedules of the libel?

A. I am not so sure about it not being one of the schedules. (After examination.) It is not connected with any of the schedules.

Q. Nor does it form part of any of the specification items?



A. It does not form part of any of the specification items. To the best of my recollection now, it was the subject of a contract, or a letter at least. I do not know if it was a contract,"——

And so on, through his entire testimony, he compares the items set forth in Kinsman's Exhibit 2 with the specifications in Saunders' No. 1, and testifies as to whether he considered it as coming under the terms of said specifications, or whether he considered it an extra. So, on page 2226, speaking of items six and seven of Kinsman's No. 2, he said he did not consider it entirely an extra, in that the work would be necessary on account of repairs recommended in item No. 1 of the original specifications, and on account of a contract for the installation of a new circulator, said contract having been awarded to the United Engineering Works prior to the main part of the repairs in "Respondent Saunders' Exhibit No. 1".

And finally, when the question arose as to the difference between Saunders' No. 1 and Christy "C", to which we call attention in our brief, the witness apprehending the difficulty, comes to the rescue with the general statement that an assembling clause would be presumed, even though not stated in the specifications (pp. 2229-30).

So, too, with Heynemann (p. 2019). He is asked:

"Q. Mr. Heynemann, in the course of your examination you may assume that this document which I hand you, which is marked 'Respondent Kinsman Exhibit No. 2'. is a copy of the first three pages of Schedule 1 attached to the libel. *You may also assume that the paper I now hand*

*you marked 'Respondent Saunders Exhibit No. 1', is a copy of specifications prepared by the respondent in this case and submitted for bids to the United Engineering Works, the libelant,' etc.*

He is then examined, as well as Gardner, upon the two papers, relying on the specifications to determine whether or not with respect to any particular item under Kinsman's No. 2, he would figure upon it as an extra, or would place it under the specifications for which he allowed only the specification price.

It is also noteworthy that appellant makes no answer to the fact that "Christy C" is identical with the copy of the specifications set up in the answer as Exhibit 1 (Record, p. 52).

That they charged us with the extra matters called for in the final clause of Saunders No. 1, which is not called for in Christy "C", is apparent.

Which one of our respective statements, then, is the more accurate?

**CRITICISM OF OUR CLAIM THAT THE PLEADINGS ADMIT THAT  
OMISSIONS, CHANGES AND MODIFICATIONS WERE MADE  
WITHOUT AN AGREEMENT BETWEEN THE PARTIES AS TO  
VALUE OF THE CHANGES, OMISSIONS AND MODIFICATIONS.**

Appellant now desires to limit this admission in the answer as referring "solely to the crank-shaft."

In order to substantiate this contention, he makes a quotation from his answer (p. 48) and interpolates therein an important statement of fact that is not contained in the answer. He quotes his allegation as follows (the italics are ours):

"That respondent is informed and believes, etc., that the just and reasonable value of the work and materials omitted as aforesaid by agreement of the parties from the original contract, as aforesaid, is the sum of \$1398.25, and of the additional work and materials (*not called for by the contract*) furnished as aforesaid, the sum of \$8280.50."

The language above quoted, "*not called for by the contract*", is an interpolation not contained in the answer, and without this interpolation, the construction he now attempts to place upon his answer cannot properly be made.

The allegation which refers to *omissions from* and *additions to*, "the original contract" is in a single sentence, viz.: "materials omitted as aforesaid by agreement of the parties *from the original contract as aforesaid*, is the sum of \$1398.25, and of the additional work and materials furnished as aforesaid, the sum of \$8280.50." The relation of both of these statements to the language "original contract", is so intimate that no



one reading it would suspect that the last valuation was intended to apply to work and materials "*not called for by the contract.*"

We do not wish in this connection to suggest that appellant has wilfully made this misquotation with the intent to deceive, though it would most likely have that effect if attention were not called to it. We think it was placed in there to emphasize the construction he desires to place on the language.

That that construction is not legitimate, is further emphasized by the fact that the valuations contained in the allegation are of two kinds, one for *omissions* and the other for *additions* (additional work and materials). Now, the principal allegation concerning the matters that were done "without an agreement between the parties as to value," refers not only to omissions, but to "*omissions, changes and modifications*". As the \$1398.25 in the allegation now under consideration, only refers to the "value of the work and materials *omitted*", what becomes of the value of the additional work and materials rendered necessary by those "*changes and modifications?*" That there was such additional work and materials, is admitted in the record, even under their contention for "substitution work". As pointed out in our original brief, there was "more expensive work" for which Klitgaard said the respondent was to pay "in addition to the contract", while with respect to the crank-shaft there is no testimony showing that there was any *additional* expense, but only a *saving*. This matter is fully pointed out in our original brief (pp. 30-31).

It is also to be noted, and is admitted in this additional brief (p. 20), that, in the answer, appellant *makes no express mention of the compensation and substituted work*. If that were his contention, it should have appeared in the answer. It is a settled rule of law that pleadings are to be construed against the pleader. Certainly it will not do to mislead the appellee, by an allegation which fairly covers all the "omissions, changes and modifications"—*those which were known to have been made in other items of the specification as well as in the crank-shaft item, and which were the chief subject of contention in the litigation, without a fair statement of the case intended to be made*. The attempt now to place a more favorable construction upon his pleadings by *ex parte statements outside of the record as to how the pleading was made up*, will not answer the purpose. The case to be tried was made up by the pleadings, and not by anything that rested in the inner consciousness of the parties. The fact that appellant now finds it necessary to interpolate in his brief, language not contained in the pleading, in order to fix his construction upon that pleading, is conclusive of the fact that without such interpolation, the construction he now desires, could not fairly be placed upon it.

### VALUE OF MODIFICATIONS NOT AGREED ON.

We see no necessity of considering the suggestions made in the new brief under this head, except that portion which attempts to develop a new theory respecting the consolidation of the numbers. The rest of it is fully covered in our original brief.

### AN "ELEVENTH HOUR" THEORY AS TO CONSOLIDATION OF NUMBERS.

Appellant now says (brief, p. 29):

"Since writing our opening brief we have become convinced that our interpretation of Curtis' testimony on this point, as found on page 171, is incorrect. This witness' consolidation order, we now contend, was not one which affected the time and material card record *of the men*, but one which affected the final sheets of the *foremen* showing the completed work, from which sheets he, Curtis, compiled his bill-heading."

There is some satisfaction in knowing that appellant has again been compelled to change his position, even though it be at the last moment, but the new position is not supported by the evidence. Like many other points made by appellant it is an attempt to put a construction upon the testimony by wresting a few words from their context. The context, however (pp. 1462-63-64), shows that this new suggestion is absolutely without foundation. For instance:

"But in the case of the 'Hilonian', the changes became so numerous that it would be impossible to give every change a number, so then the work was considered collectively, that is the job was run collectively under the numbers as mentioned in Exhibit 1."



Q. Then does 5295 contain work not included in the original list of 5295?

A. 5295 includes a great deal more work than what was set forth in the original list that was put under the number of 5295.

Q. How does that occur?

A. In this way: When I went over to the yard, as it is my duty, I go through the different departments. The foremen stated to me there were numerous changes being made from the lists which they had. They said that there were a number of numbers placed to cover these changes. I explained to them at the time that that was under my orders. Then they stated that the changes were becoming so numerous that if I wanted to keep track of all these changes I would have to put in a great many numbers, so in order to simplify that I instructed the foreman of every department to use the numbers on the job collectively and to note on their sheets the work as they actually performed it. \* \* \*

Q. As the result of this, what I wish to develop is whether or not 5295 *contains work different from the original lists and many changes not noted.*

A. *Yes, sir, it does.*

Q. Were some of these changes great deviations?

A. Yes, sir, there were many of the changes great deviations because they were brought to my *attention at that time.*

Q. Would it be possible at this date to segregate those changes?

A. No, sir, it would not. They could not be segregated.

Q. You did, however, segregate part of them under the bill as you have testified to, of Exhibit No. 4. How did you do that?

A. That was a change that was performed on 5295, and I was informed that a price has been given for that work. Immediately on this infor-

mation, *and as the work was progressing*, I went over there and called on the men that performed this part of the work and *were performing it*, and the foremen of their different departments, and took *those cards containing the labor and the material containing these parts out of 5295*.

Q. You did that *at the time the work was progressing?*

A. Yes, sir.

Q. And had the pieces before you?

A. Yes, sir, they were in the shop."

This shows conclusively that the changes were made as the work progressed, and without a new number, but on the cards of the men were placed under No. 5295, and that in one instance, in order to segregate such changes from No. 5295, he went to the yard and called the men that were performing the work, together with their foremen, "*and took those cards containing the labor and material containing these parts out of 5295*".

This was done by having the pieces before him at the time.

The instruction to the foreman of every department to use the numbers on the job collectively, was only a medium through which those numbers were passed to the men to be used on the job collectively, because the testimony is undisputed that the men got their job numbers from their foremen (p. ....), and if the foreman was using them collectively they would of necessity appear upon the men's cards collectively.

So, too, with appellant's quotation of testimony from Vol. V, pp. 1587-1589. He has left out the por-

tion which disagrees with his new theory. Let us transcribe the whole testimony:

“Q. Now, Mr. Curtis, you have said that the labor and material found on Schedule 1 was furnished under certain numbers that you gave?

A. Yes, sir.

Q. That is correct, is it?

A. Yes, sir.

Q. And that in making out Schedule 1 you discarded these numbers and consolidated all the work and material under that schedule, without giving it a number?

A. I did not discard the numbers. I used those numbers collectively. I used that as a serial number for that, and consolidated all the work done under these numbers in Schedule 1.

Q. You used what is a serial number?

A. These numbers that I gave were on Schedule 1 collectively.

Q. You discarded all those numbers in framing your bill. You did not put any of them on your bill?

A. No, sir; because they were on Mr. Putzar's sheets.

Q. What was your reason for doing that?

A. My reason for doing that was that there were so many changes and interchanges that conflicted one with the other with pieces that were changed and rechanged, machined and remachined to suit different conditions that arose that it was impossible to segregate and keep a segregation in work under a number, for the reason there were so many changes occurring. It would take a great number of numbers to keep track of it.

Q. These several numbers which were consolidated in Schedule 1 were placed on the lists of work to be performed by you, were they?

A. They were, yes.



Q. And during the progress of the work the workmen placed those respective numbers on their time cards, did they not?

A. They did.

Q. As they did work under that particular list, did they not?

A. Yes, sir.

Q. What was the difficulty, then, that you found in taking Mr. Putzar's time-sheets with these several numbers attached to the work? What was your difficulty in still maintaining those numbers separate and distinct?

A. The numbers were used collectively on the job; that is, the *man who had that department number used that department number*—

Q. Excuse me. What department number do you refer to?

A. I mean the number that was *given to the man by the foreman. He uses that number regardless of what change was made on the order that was issued for that number. That is, he keeps track of those changes under that order, and kept his time under that number.*"

Does that testimony warrant the contention that the men had separate numbers for these changes on their cards, which were only consolidated by the foreman or by Mr. Curtis in his bill-head? Is it not absolutely plain that when the witness spoke of numbers being used collectively on the job, that he meant that the number was given to the men by the foremen, and that the men used that number regardless of what change was made in the order,—that he keeps track of those changes under that order, and kept his time under that number?

Again (p. 1597), in speaking of keeping a separate number for changes in the smoke-stack, the witness says:

“A. As I told you before, the changes were becoming so great and extensive and so many of them, and some of them large and some of them small, that in order to simplify matters *we did not put in any more numbers.*”

See, also, continuing on page 1598.

**CAPTAIN MATSON ARBITRARY AND IMPETUOUS.**

That libelant attempts to gainsay this fact, is natural, because it is the underlying fact that gave rise to the dispute and character to the litigation. It is neither "beside the issue", nor is it false, nor is it improperly suggested or unfair, nor is it in the nature of an "undignified appeal to jurors." A man's nature and disposition are often more lucid explanation of his acts than are his direct statements concerning the same. So well understand is this, that in all departments of science the announcement of new discoveries, or new theories, by the very best of scientists, is always carefully weighed by what is known of their personal equation,—so far is this from an appeal to passion or prejudice, and so thoroughly in accord is it with the methods of the calm, cool judgment of an exact science.

The statements made are true. Not only is it Mr. Heyneman's judgment of the man, which judgment as it appears in the record was not attempted to be gainsaid, but the fact is so unmistakably evidenced in the testimony of Captain Matson as to defy contradiction. The witness does not need to be "seen" "in giving his testimony", for it does not lie in the physical manner of his testifying alone, but is innate in the language of the testimony itself.



## CRITICISM OF OUR STATEMENT RESPECTING 10 YEARS OF AMICABLE RELATIONS.

It is said this statement is contradicted by the gratuitous statement of our own witness, that he had one "big row" with the Matson Navigation Co. over a ship.

Instead of being a contradiction, this is a confirmation of our contention, for *that* "big row" was amicably adjusted, and this only goes to prove that *this* "big row" might also have been amicably adjusted if the Matson Company had approached the question in a spirit of fairness.

But it is said that they *did* approach it in such spirit, because Mr. Diericx proposed to pay the bill "at a compromise figure". However, there is nothing to show how that was made, or what that proposal was. Their original offer was something over \$15,000. After the controversy had arrived at the point of litigation, the Matson Company concluded that it actually owed not less than something over \$22,000. Offering to pay very much less than is claimed to be due, is approaching the matter in a very different spirit from that suggested by the United, namely, to sit down together and check the amount up, not for the "purpose of a compromise", but for the *purpose of ascertaining to the satisfaction of both parties what was actually due.*

**REFUSAL TO CHECK UP APPELLEE'S BILL BOTH BEFORE AND  
AFTER SUIT.**

It is suggested that the first offer to check up the bill before suit was only "for any clerical errors". That is rather a narrow construction to place upon the testimony of the witness, when it nowhere appears that the *refusal* to check up the bill was based on the ground that the offer was only for "clerical errors". Appellant ignores the other statement of the witness, cited in our original brief, that "the bill was never gone over nor checked up with anybody interested in the steamer *as regards time. That is usually done*". Having in view the long course of dealing between these parties preceding this dispute, and this testimony regarding the usual method of checking up the bill, it cannot fairly be presumed that the Matson Navigation Company understood the offer to check up to be limited in the manner now suggested.

So, too, with the offer to check up after suit brought.

The quotation in appellant's brief (p. 14), with its italics, is characteristic of the treatment of this whole case. He says:

"We find such offer couched in these words: '*Now, if there is any portion of this bill that you are ready to concede, so that we can prove that which you contest, why, I would be very glad to cut down the entire examination.*'"

Stopping at that point of his quotation will not answer for a true statement of the offer then made,

for he has left out the very material statement immediately following, which is as follows:

“I will say now that Mr. Diericx was invited to go over these details and check up this entire work in its detail, which you declined to do, and *if you will check it up with us now we can do it now.*” (R. Vol. 1, p. 166.)

If this was not an offer to check up the entire work in its detail, then and there, we do not know the meaning of the English language, and the fact that appellant has omitted it in his reply brief shows that he so understood it. But to have quoted the entire sentence would have made entirely nugatory his attempted argument that counsel for the United was “oblivious of the fact that we had already admitted the minor contracts of the libel”, etc.

His alleged admissions do not meet the issue. And so, too, his “admitting the rates of labor on appellee’s bill to be correct” was, as pointed out in our original brief, no admission at all, because those rates of labor were known by both parties, not to apply to the reduced hours of labor contended for by appellant.



**APPELLANT'S CHARGES OF COLLUSION AND FRAUD.**

That both the record in the case, as well as appellant's brief, are replete with such charges, both direct and by inferences more potent in their nature than direct charges, cannot be gainsaid. The fact that appellant now, after having permeated the entire record with such suggestions, is compelled to practically withdraw them with the statement that "We do not ask the Court to follow counsel in these inferences" is a qualified acknowledgment of the injustice of the position taken by him, but it does not relieve the situation. If we have been acting fairly, and not attempting to take advantage of the appellant in this transaction, then every excuse for this litigation on the part of the appellant drops from under him. The charges of collusion and fraud, and that alone, are the foundation of this litigation. That we did the work, is not denied. That we did it conscientiously, cannot be denied, and that throughout there is no indication of a desire to incur unreasonable or improper cost, cannot be denied; and if appellant had approached the subject in the same spirit, there would have been no controversy. But that appellant is attempting to secure something not its due, because of its appreciation of the fact that technical proof of the details of this work is exceedingly difficult, is the one glaring fact standing out prominently both upon the record and in the argument.

**PUTZAR'S POSITION IN HIS RELATION TO THE PARTIES.**

So also we are pleased to find that appellant now emphatically denies that he makes any attack upon Putzar's integrity and reputation (reply brief, p. 75).

That no man can read his original brief, or the record at the trial and fail to appreciate that such attack was made, is plain. People do not, as a rule, charge a man with a wilful failure to keep the record for which alone he was employed, and accepting the record of the party against whom he is employed to check; nor do they charge him with assuming the duties of supplying additional work for the advantage of the builder; nor do they charge him with making agreements with the builder for the recognition of extra hours not worked for, against the interests of his employer, and unauthorized by his employer; nor do they charge him with "covertly" negotiating with libellant and settling the days' time on the ship; nor do they charge him with withholding his independent record and going to the builder for his record to be supplied to his employer, when his independent record is called for; nor do they charge him with doing the "trick" by the allowance of double time, copied from the builder's records, and signing the sheet; nor do they charge him with passing over to the builder his record which it is claimed "was the sole property" of his employer; nor do they charge him with approving, as an appropriate charge against his employer, charges that should not be so charged and characterize such acts as "fraudulent collusion"; nor do they charge him with wilfully with-

holding his records from his employer; nor do they suggest that when he has found himself in difficulty with the incomplete record, that it would "have been the proper and appropriate thing for him to have asked assistance from his employer, and not from the other side"; nor do they "make bold to further assert" that like "the seventh son of a prophet" they can read between the lines, and come to the conclusion that the man has secured from the builder the material for the report to his employer, because he himself had not the material, and to that extent was deceiving his employer; nor when directly asked whether or not they would undertake to say that he was not a man whose reputation among all people who have dealt with him was that of the very highest integrity, reply, "I refuse to answer that question" (Rec. p. 1698), nor, generally, would they prefer such a contention as is contained between pages 73 and 122 of the original brief, if they were not making an attack upon the man's integrity.

The suggestion that we are making a personal attack upon appellant by our characterization of those insinuations and inuendoes will not answer, while the pathetic position of "remaining mute", may perhaps be the only means of disposing of an unanswerable fact.



**CRITICISM OF OUR STATEMENT THAT AS THE WORK PROGRESSED THE SPECIFICATIONS WOULD NOT ANSWER THE PURPOSE, AND AFTER PREPARATION HAD BEEN MADE, AND PARTS OF THE VESSEL TORN OUT, PART OF THE WORK HAD TO BE ABANDONED AND OTHER WORK SUBSTITUTED.**

Appellant comments upon our justifying this statement with the testimony of Siverson (pp. 1090-3).

On page 46 of our original brief the same subject-matter is treated, and reference there made to Siverson, Vol. III, pp. 1089-1096, and Taylor, Vol. III, p. 1085; also on pages 6 and 7 of our brief, instances are given with references to Vol. VII, pp. 2354, 2355 and 2417, to Vol. III, p. 1098. These references are ignored by appellant in his present criticism.

We now further call attention upon this subject to Vol. IV, pp. 1137-1144.

Appellant in this criticism also ignores the numerous changes made in the specifications in what he calls "substituted work".

Was not every particle of this work found and determined upon after the work had proceeded along the lines laid out in the specifications? What about the patch substituted for the column? Was it not agreed upon after the engine had been dismantled and preparation made for the column? What about the crank-shaft? Was not the work on that changed after the work had progressed along the original lines? And in like manner we might go on referring to each of the changes in the specifications which appellant claims as "substituted work".

The testimony appellant cites to show that the specifications were being followed does not in anywise aid his contention—that Siverson says the specifications were consulted and when any particular line of work called for by the specifications came up, the opinion of Klitgaard and Putzar would be taken regarding the manner in which they wanted it done, and it was done in that way. Done in what way? In the way called for by the specifications, or in the way desired by Putzar and Klitgaard? The entire record shows that the way of Putzar and Klitgaard consisted of repeated deviations from the specifications, amounting to a large amount of what appellant calls “Substituted work”. That we were referring to these changes, in the statement which appellant now criticises is made plain by the fact that in direct connection with said statement, we proceed as follows:

“It is the contention of the Matson Company that these changes were agreed upon as substitutes, without further charge, between Klitgaard for the Matson Company, and, in some instances Wilhelmson, and in other instances Gray, for the United” (Brief, p. 5).

The inconsistency of this criticism on the part of appellant is further made plain by his admission on page 11 of his reply brief, where, when speaking of the extra work for which his “experts” made allowances, he says:

“But this was evidently work *which was uncovered in the doing of the specification work*, and although it amounted to considerable in the aggregate, it was comparatively insignificant in the

detail (with the exception of the tank top work), and *we surmise* it was not thought of sufficient importance, as each item was discovered, to call for a special price.”

We think in the foregoing, appellant’s challenge to us to point out particular items, is fully covered.



CRITICISM OF OUR REPLY TO THE CLAIMS OF ERROR IN  
THEIR APPENDIX NO. 1.

We despair of making any headway with parties, who, after reading our brief with the minute attention to detail that the reply brief indicates, make the assertion that our declaration of intention to show how “palpably unfounded those objections are, never took any more definite shape than a reference to certain parts of the record as a complete answer,” and then refer to the *last heading* of our Appendix No. 2 (p. 79) as containing *all* that was said upon that subject, and who *ignore the rest of said Appendix No. 2* (pp. 61-79), as well as that part of the body of the brief itself which treats of the same subject, namely, pages 119 et seq. and page 130.

**CRITICISM AS FOLLOWS (Reply Brief, p. 8):**

*“At the top of page 6 it is asserted that the contention of appellant is, that it was to receive a credit from the upset price of the contract if the crank-shaft was not removed, and that THIS CONTENTION is denied by the United.”*

That is not the statement of our brief at all. In making that suggestion appellant entirely ignores the controlling elements in the statement he criticises, namely:

*“And in other respects the upset price was to govern.”*

That is what the United denies, and we think we have made it perfectly plain throughout the record, as well as throughout our brief, that our contention has always been that “the upset price was to govern” *only* in case the work was done “*in strict accordance with the specifications*”.

**CRITICISM OF THE STATEMENT THAT AT THE TIME OF A TENDER OF A CHECK FOR \$15,500, CAPTAIN MATSON HAD NOT SEEN THE BILLS, NOR DID HE KNOW ANYTHING ABOUT THE FACTS (Reply Brief, p. 13):**

Counsel says that he is unable to verify this statement by the record. We think the reference on page 8 of our statement of facts fully bears it out. However, we might add thereto the fact that the telegram in question was dated November 26th (p. 1751) and that Captain Matson himself testifies that he first began to look into the bill as soon as he came back from Newport News, which was December 10th, and that he then commenced to look into the bill, and does not think he had the bills in the office until a long time after that. That he knows it was a long time before he got the bill (pp. 1716-17-18), and when pressed with the fact that the bills had been presented a long time before that date, he says:

“Well, they got in there then *between the time I left and when I came back*” (p. 1718).



**RENEWED ATTEMPT, BY THE DUAL USE OF THE WORD "TIME-KEEPER" TO SUGGEST THAT SJOBERG WAS A TIME-KEEPER IN THE SENSE THAT PUTZAR WAS A TIME-KEEPER, INSTEAD OF A CLERK IN THE OFFICE, WHO MERELY RECORDED THE TIME AFTER IT WAS CHECKED UP AND CERTIFIED TO AS CORRECT BY THE FOREMAN ON EACH PARTICULAR JOB.**

We only desire to point out the repetition of this contention. There is no dispute that Mr. Adamson kept the time in the shop; that his position was created absolutely for the purpose of keeping the proper time on the separate jobs as they came in the shops, and checked off the time that was put on each job. Neither can there be any dispute that Taylor, the foreman in his department, and Siverson, foreman in his department, performed the same office each day. The testimony is undisputed on this point. See also Dolan, Nelson and Allen (pp. 501, 124, 1030, 1031, 1125, 1186).

As to Sjoberg being a clerk, Dolan says, page 154:

“Q. In what respect is he a time-keeper?

A. I take my tickets and give them to him.

Q. Is he the man that does the clerical work after the time tickets are turned in to him?

A. Yes.

Q. He does not oversee the work of the men?

A. No, sir.

Q. He has charge of the time cards when they come into the office?

A. Yes, sir.

Q. And that is what you call a time-keeper?

A. Yes.”

See also Curtis, page 1427.

THAT PUTZAR KEPT AN INDEPENDENT TIME-BOOK IS NOT  
DISPUTED.

We are asked where we find support in the record for this assertion.

There is no one who directly testifies that he did *not* keep a handbook, while Curtis and Kinsman directly testify that he *did* have such a book (V, pp. 1872-73; V, p. 1517).

The first of these references is also contained in our original brief.

That, in the face of this undisputed record, appellant should claim the contrary "is the very *cruix*" of his contention, does not help the matter. We are not sure whether or no, by the use of that term, he means that his contention is a "conundrum", or that it has become his "cross", for they both are the dictionary definitions of the word.

CRITICISM OF OUR STATEMENT THAT THERE WAS ALSO SOME NIGHT WORK AFTER MR. PUTZAR WAS APPOINTED ENGINEER, DURING WHICH TIME IT IS CONCEDED HE WAS ON BOARD (Reply Brief, p. 76).

Appellant says:

“We emphatically deny any such concession, and ask that counsel substantiate the statement from the record, if he can, etc.”

Saunders testifies that Putzar was appointed *chief engineer a week before she went out* (p. 1777). Is the denial of the alleged concession that “he was on board”, intended to suggest that he was not attending to his duty as chief engineer?



### THE CONTRACT AN ENTIRETY.

In his attempt to controvert our claim that the contract is an entirety, appellant addresses himself to a criticism of our statement that the specifications "contained 15 items, most of which are interlocking work upon an engine". He then attempts to prove that these 15 items of the specifications do not interlock, one with another.

While we take direct issue with him upon that suggestion, nevertheless, whether they interlock or no is not the material point. "*The contract price*" does "interlock", if we may use that expression. In other words, there is a single price fixed for the entire work called for by the 15 specifications, but the contract furnishes no rule to determine the value of the work to be done under any particular item, and the contract, to use the language of the Court in *LINCOLN V. SCHWARTZ*, "furnished no rule to determine the value of any specific portion of the work", or, as said in *PITCAIRN V. PHILLIPPS Co.*,

"The contract itself did not attempt to apportion this sum among various items, and there was, therefore, no basis for such an appropriation, if otherwise it could have been appropriately made. The contract being entire, the price to be paid is single, and the consideration is absolutely for the performance of the whole work contracted to be performed."

And again, as it is said in *ROUNDS V. AIKEN MFG. Co.*,

"The gross sum \$53,198 is contracted for by them in payment for all their work and materials they should furnish in building the mill under their bid in writing. This being a sum in gross, how could any one determine what particular price (piece) of the work or material in said mill building would cost?"

Appellant's attempt to distinguish these cases, absolutely ignores the point thus made.

The foregoing is a complete answer to appellant's criticism about the entirety of the contract. Nevertheless, most of the *work* itself is interlocking, and the mere fact that it is stated in separate items, does not in anywise affect the proposition. All of the work on the engine required a dismantling of the engine and shafts, before the detail of any part thereof called for in the different items of the specification could be begun.

The closing paragraph under this heading (appellant's reply brief p. 26) is not a fair statement of our contention. We do not claim that *because a certain item was omitted we can charge a greater price on that account*. We do not say that because one of the 15 items is left out we can charge more for the other 14 items. What we do say is, that our figure of \$11,749 was made upon the assumption that the work should be done in strict accordance with the specifications, and if not so done, that appellant should pay on a *quantum meruit*, instead of a fixed price. If a single item were *omitted*, presumably the *quantum meruit* would be less than the fixed price. *But in this case it is not a question of having simply omitted one item*. There was not only an omission, but there were "changes, modifications and *additions*" so that the work actually done entailed more labor and materials than that called for by the specifications. If, therefore, on a *quantum meruit* it should cost more than the original bid, that result is not due to the *omission* of one item of the specifications, but is due to the *addition* to many other items of the specifications.

**OUR CALLING OTHER WITNESSES TO TESTIFY DIRECTLY TO  
SOME OF THE CARDS TESTIFIED TO BY ADAMSON.**

Under this heading it is suggested that we only called 15 extra witnesses out of a possible 31 (p. 65).

The fact that the others were absent, or dead, is in this connection ignored, and the fact that their cards were proven by proving their handwriting is also ignored. Our contention of the competency of such proof of the cards, under the rule laid down in the case of *WISCONSIN STEEL Co. v. MARYLAND ETC. Co.*, quoted in our brief at pages 133-34, must not be lost sight of.



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**ADMISSIBILITY OF PUTZAR'S SHEETS AND TIME CARDS.**

**DOES THE STATE LAW OF EVIDENCE APPLY?**

**WHAT IS THE RULE OF EVIDENCE IN A COURT OF ADMIRALTY?**

Appellant has seen fit to attempt to import into this proceeding the section of the Code of Civil Procedure of the State of California as applied to the admission of evidence. We will give that subject a few moments' attention.

In support of this contention, Sec. 721 of the Revised Statutes is cited. Appellant, however, overlooks the fact that the very language of the statute limits its application to "*trials at common law*". Commenting upon this fact, the Supreme Court in the case of *BUCHER v. CHESHIRE R. Co.*, 125 U. S. 582, said:

"The language of the statute limits its application to cases of trials at common law. There is, therefore, nothing in the section which requires it to be applied to proceedings in equity or in admiralty; nor is it applicable to criminal offenses against the United States."

It would have been more to the purpose if appellant had referred to the fact that, in matters of evidence, so far as a *Court of Admiralty* from being controlled by the State statutes, that it is a settled rule in such Courts that not only are they not bound by the rules of evidence which are applied in Courts of common law, *but they may, where justice requires it, take notice of matters not strictly proved and may receive in evidence testimony which might not be admissible in other Courts.*



In *THE J. F. SPENCER*, 3 Bened. 337, it is said:

“Were this a proceeding at common law, those copies could not be received in evidence for any purpose. If they were copies of documents on file in the office of the American Consul, they would be admissible under the Act of January 8th, 1869 (15 Stat. 266). Being from the office of the British Consul, they are not made evidence by any statute. Nevertheless, I am of the opinion that they are admissible in a court of admiralty. Courts of admiralty are not bound by all the rules of evidence which are applied in the courts of common law, and they may, where justice requires it, take notice of matters not strictly proved. Thus, Dr. Lushington says, in the case of *THE PEERLESS*, 1 Lush. 41: ‘This court has, both in prize matters and in civil suits, been accustomed to receive evidence which would not have been admitted in other courts. For instance, affidavits sworn almost in every way, before justices of the peace, commissioners in chancery, etc., even evidence not on oath, as where, according to the custom of some of the states in the north of Europe, the original evidence was not taken on oath, but the person giving it undertook to make oath afterwards, if required. So, from the necessity of the case, all parties interested were, contrary to the laws of other courts at the time, admitted to give evidence in cases of collision, salvage, and others.’”

See, also, *THE BOSKENNA BAY*, 22 Fed. 667.

The rule thus announced, fits in very well with and as an extension of the common law rule announced in *WISCONSIN STEEL Co. v. MARYLAND STEEL Co.* cited in our original brief, which recognizes a relaxation of the hearsay rule in cases of practical necessity arising in large mercantile and manufacturing businesses, where the transaction has been participated in

by numerous employees. Having in view the difficulties attending the making of exact proof under such circumstances, the nature of the defense in this case emphasizes the justice of the rule which requires the Court to take notice of matters not strictly proved, under the power thus resting in a Court of Admiralty.

In this connection we take occasion to remark that, through what appears to be a lack of familiarity with the principles which have given the admiralty its distinctive claim to be a Court of "justice", as distinguished from a mere Court of law, those principles seem in recent days frequently to be lost sight of, to the permanent injury of the administration of justice.

# OUR EVIDENCE AS COMPARED WITH EXPERT EVIDENCE.

Appellant again lays stress upon the value of the testimony of his experts, as against the showing that we made from our records. Sufficient has been said in our original brief upon this subject, but we cannot refrain from adding at this point a quotation from the decision of the Supreme Court in a similar case, indicating its view of the relative value of these two kinds of evidence.

In *SIMPSON v. BAKER*, 2 Black. 581, this appears (our italics) :

“The libelant proved his demand for work and materials furnished by the books and accounts kept by his clerks, and the court may well have considered this better evidence than the opinions of experts, *taken ex parte to undervalue the work and count the treenails after the sheeting was replaced and the repairs covered with paint.*”

How thoroughly in accord is this suggestion of the Supreme Court with our criticism of the testimony of the experts in this case.



PRESUMPTION ARISING FROM THE FINDINGS OF THE  
TRIAL COURT.

Under this head, appellant takes us to task for stating that "there exists the presumption arising from the findings of the District Court" against "appellant's statement of 'facts of the case' which are rather a statement of some of its *contentions*". This he calls "Counsel's *pretended* conception of the law relative thereto".

Though we are not conscious of having made "*frequent*" reference to these "presumptions", we stand ready to defend the statement before referred to, notwithstanding that it is suggested that our doing so "must be looked upon with no little surprise". We are fully advised that there is a difference in this respect between a cause where the lower Court has seen the witnesses, and one where the testimony is taken before a commissioner, but to say that in the latter case there is absolutely no presumption in favor of the correctness of the decision is stretching the rule beyond the limits of common sense. This Court has, at least inferentially, recognized this fact in the case of *THE JOSEPH B. THOMAS*, 86 Fed. 660, when it used the following language:

"The conclusions of the trial court upon disputed questions of fact, where the witnesses were present at the trial are, as a general rule, accepted by the appellate court. (Citing cases.) But the reason in favor of that rule does not exist, and cannot be applied (*at least, not to the same extent*), in a case like the present, where all of the testimony was taken before an examiner."

The parentheses are the Court's but the italics are our own.

So, also, in the case of *PERRIAM v. PACIFIC COAST Co.*, 133 Fed. 144, this Court was reviewing a case where the testimony was taken *before a commissioner* and reported to the Court, and speaking of the findings of the District Court, this Court said:

“On reading the voluminous and conflicting evidence in the record, we are not convinced that these conclusions were erroneous. The general rule is well established, and has been repeatedly affirmed by this and other courts, that the findings of fact of the trial court in an admiralty case, made upon conflicting testimony, will not be disturbed on appeal, unless they are found to be clearly against the weight of the evidence.”

Aside, however, from the foregoing suggestions, it is a settled principle applying to all Courts, admiralty or common law, that there is a presumption that the Court has done its duty, and done it correctly. This principle is elementary and requires no special citation of authority.

Moreover, in the present case the District Court had the same record before it as this Court has, and was in the same position as this Court is, to pass upon the facts. If the fact that the witnesses were not before it, deprives its decision of any presumption of correctness, then the same rule must apply to the decision made in the appellate Court, notwithstanding it is a trial *de novo*.

This Court, therefore, starts with the presumption that the findings of the trial Court are correct, though

upon the examination of the record, the appellate Court may conclude that the judgment was erroneous. *Prima facie the judgment is right.*

When we start, therefore, with the presumption that appellant's contentions are unfounded, we are *not* laying ourselves open to the charge of attempting to mislead the Court by "pretending" that the law is different from what it in fact is. Our chief purpose in the foregoing is to combat the suggestion that we are presenting to this Court a suggestion in which we ourselves have no faith.

Respectfully submitted,

NATHAN H. FRANK,

IRVING H. FRANK,

*Proctors for Appellee.*



No. 2258

United States  
Circuit Court of Appeals  
For the Ninth Circuit

SPOKANE & INLAND EMPIRE RAILROAD  
COMPANY, a Corporation,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record

Upon Writ of Error from the United States District Court  
for the Eastern District of Washington  
Northern Division

RECEIVED

MAR 17 1913

F. D. MONCKTON,  
CLERK

FILED

MAR 24 1913



No. \_\_\_\_\_

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United States  
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*In the District Court of the United States for the Eastern District of Washington, Northern Division.*

No. 1261.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD  
COMPANY,

Defendant.

---

ADDRESSES AND NAMES OF ATTORNEYS  
OF RECORD.

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Building, Spokane, Washington,

Attorneys for Plaintiff in Error.

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Attorney, Federal Building, Spokane, Washington,  
Attorneys for Defendant in Error.



*In the District Court of the United States, for the Eastern District of Washington, Northern Division.*

No. 1261.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD  
COMPANY,

Defendant.

COMPLAINT.

Now comes the United States of America, by Oscar Cain, United States Attorney for the Eastern District of Washington, and brings this action on behalf of the United States against the Spokane & Inland Empire Railroad Company, a corporation organized and doing business under the laws of the State of Washington, and having an office and place of business at Spokane, in the State of Washington; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

FOR A FIRST CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved

April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 304, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane, in the State of Washington, within the jurisdiction of this court, when the grab irons or handholds were missing from the ends of said car, and when said ends of said car were not provided with secure grab irons or handholds, for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

#### FOR A SECOND CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2,

1903 (contained in 32 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 303, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington, within the jurisdiction of this court, when the grab irons or handholds were missing from the ends of said car and when said ends of said car were not provided with secure grab irons or handholds, for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

#### FOR A THIRD CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 contained in 32 (Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line



of railroad one car, to-wit: I. E. S. 305, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington within the jurisdiction of this court, when the grab irons or handholds were missing from the ends of said car and when said ends of said car were not provided with secure grab irons or handholds, for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

#### FOR A FOURTH CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 63, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington within the jurisdiction of this court, when the grab irons or handholds were missing from the ends of said car and when said ends of said car were not provided with secure grab irons or handholds, for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

#### FOR A FIFTH CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 17, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of

railroad easterly from Spokane in the State of Washington, within the jurisdiction of this court, when the grab irons or handholds were missing from the ends of said car, and when said ends of said car were not provided with secure grab irons or handholds, for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

#### FOR A SIXTH CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 65, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington, within the jurisdiction of this court, when the



grab irons or handholds were missing from the ends of said car, and when said ends of said car were not provided with secure grab irons or handholds, for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

#### FOR A SEVENTH CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 300, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington, within the jurisdiction of this court, when the grab irons or handholds were missing from the ends of said car, and when said ends of said car were not

provided with secure grab irons or handholds, for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

#### FOR AN EIGHTH CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 30, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington, within the jurisdiction of this court, when the grab irons or handholds were missing from the sides of said car, and when said sides of said car were not provided with secure grab irons or handholds, for greater security to men in coupling and uncoupling cars, as

required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

FOR A NINTH CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 18, which line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington, within the jurisdiction of this court, when the grab irons or handholds were missing from the ends of said car, and when said ends of said car were not provided with secure grab irons or handholds, for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.



Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

FOR A TENTH CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 10, which said line of railroad was at said time a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington within the jurisdiction of this court, when the grab irons or handholds were missing from the ends of said car, and when said ends of said car were not provided with secure grab irons or handholds, for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the vio-

lation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

FOR AN ELEVENTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 12, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington, within the jurisdiction of this court, when the grab iron or handhold was missing from the side of the car near "A" end of said car, and when said side of said car was not provided with secure grab irons or handholds for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

## FOR A TWELFTH CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85) and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 27, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington, within the jurisdiction of this Court, when the grab irons or handholds were missing from the ends of said car, and when said ends of said car were not provided with secure grab irons or handholds for greater security to men in coupling and uncoupling cars, as required by section 4 of said Safety Appliance Act, as amended.

Plaintiff further alleges that by reason of the violation of said Act of Congress defendant is liable to plaintiff in the sum of one hundred dollars.

## FOR A THIRTEENTH CAUSE OF ACTION

plaintiff alleges that said defendant is, and was



during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 10, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington, within the jurisdiction of this Court, when the coupling and uncoupling apparatus on the "A" end of said car consisted of what is known as the link and pin coupler, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by Section 2 of the Safety Appliance Act, as amended by Section 1 of the Act of March 2, 1903.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, as amended,

defendant is liable to plaintiff in the sum of one hundred dollars.

FOR A FOURTEENTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 50, which said line of railroad at said time was a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington, within the jurisdiction of this Court, when the coupling and uncoupling apparatus on the "A" end of said car consisted of what is known as a link and pin coupler, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as

required by Section 2 of the Safety Appliance Act, as amended by Section 1 of the Act of March 2, 1903.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

FOR A FIFTEENTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act Approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), said defendant, on October 23, 1911, hauled on its line of railroad one car, to-wit: I. E. S. 4, which said line of railroad at said time was a highway of interstate commerce;

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad easterly from Spokane in the State of Washington, within the jurisdiction of this Court, when the coupling and uncoupling apparatus on the "A" end of said car consisted of what is known as a link and pin coupler, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped



with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by Section 2 of the Safety Appliance Act, as amended by Section 1, of the Act of March 2, 1903.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

WHEREFORE, plaintiff prays judgment against said defendant in the sum of fifteen hundred dollars and its costs herein expended.

(Signed) OSCAR CAIN,  
United States Attorney.

Endorsements: Complaint. Filed January 3, 1912.  
W .H. Hare, Clerk. By S. M. Russell, Deputy.

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*In the District Court of the United States for the Eastern District of Washington, Northern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD  
COMPANY, a Corporation,

Defendant.

ANSWER.

Defendant makes the following answer to the complaint of plaintiff:

I.

Answering the first cause of action set forth in the complaint of plaintiff, defendant admits that it is

and was during all the times mentioned in said complaint, a common carrier, engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 304, which said line of electric railway at said time was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said first cause of action alleged, which has not been herein specifically admitted.

## II.

Answering the second cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint, a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington, that on October 23rd, 1911, it hauled on its said line of electric railway, one car, to-wit: I. E. S. 303, which said line of electric railway at said time was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said second cause of action alleged, which has not been herein specifically admitted.

## III.

Answering the third cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit:

I. E. S. 305, which said line of electric railway at said time was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said third cause of action alleged, which has not been herein specifically admitted.

#### IV.

Answering the fourth cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 63, which said line of electric railway at said time was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said fourth cause of action alleged, which has not been herein specifically admitted.

#### V.

Answering the fifth cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint, a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 17, which said line of electric railway at said time was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said fifth cause of action, alleged, which has not been herein specifically admitted.



## VI.

Answering the sixth cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 65, which said line of electric railway at said time was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said sixth cause of action alleged, which has not been herein specifically admitted.

## VII.

Answering the seventh cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint, a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 300, which said line of electric railway at said time was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said seventh cause of action alleged, which has not been herein specifically admitted.

## VIII.

Answering the eighth cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the time mentioned in said complaint, a common carrier engaged in interstate

commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 30, which said line of electric railway was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said eighth cause of action alleged, which has not been herein specifically admitted.

IX.

Answering the ninth cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint, a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 18, which said line of electric railway at said time was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said ninth cause of action alleged, which has not been herein specifically admitted.

X.

Answering the tenth cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint, a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 10, which said line of electric railway at said time was a highway of interstate

commerce; and defendant denies each and every allegation, matter and thing in said tenth cause of action alleged, which has not been herein specifically admitted.

### XI.

Answering the eleventh cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 12, which said line of electric railway at said time was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said eleventh cause of action alleged, which has not been herein specifically admitted.

### XII.

Answering the twelfth cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 27, which said line of electric railway at said time was a highway of interstate commerce; and defendant denies each and every allegation, matter and thing in said twelfth cause of action alleged, which has not been herein specifically admitted.



## XIII.

Answering the thirteenth cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint, a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 10, which said line of electric railway at said time was a highway of interstate commerce; and defendant further admits that on said date it hauled said car over its line of electric railway easterly from Spokane, in the State of Washington, within the jurisdiction of this Court, when the coupling and uncoupling apparatus on the "A" end of said car consisted of what is known as the link and pin coupler, and when said car was not equipped with couplers coupling automatically by impact, and defendant denies each and every allegation, matter and thing in said thirteenth cause of action alleged, which has not been herein specifically admitted.

## XIV.

Answering the fourteenth cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 50, which said line of electric railway at said time was a highway of interstate commerce;

and defendant further admits that on said date it hauled said car over its line of electric railway easterly from Spokane, in the State of Washington, within the jurisdiction of this Court, when the coupling and uncoupling apparatus on the "A" end of said car consisted of what is known as the link and pin coupler, and when said car was not equipped with couplers coupling automatically by impact, and defendant denies each and every allegation, matter and thing in said fourteenth cause of action alleged, which has not been herein specifically admitted.

#### XV.

Answering the fifteenth cause of action set forth in the complaint of plaintiff, defendant admits that it is and was during all the times mentioned in said complaint, a common carrier engaged in interstate commerce by interurban electric railway in the State of Washington; that on October 23rd, 1911, it hauled on its said line of electric railway one car, to-wit: I. E. S. 4, which said line of electric railway at said time was a highway of interstate commerce; and defendant further admits that on said date it hauled said car over its line of electric railway easterly from Spokane, in the State of Washington, within the jurisdiction of this Court, when the coupling and uncoupling apparatus on the "A" end of said car consisted of what is known as the link and pin coupler, and when said car was not equipped with couplers coupling automatically by impact, and defendant denies each and every allegation, matter and thing in said fifteenth cause of action alleged, which has not been herein specifically admitted.

FURTHER ANSWERING the complaint of the plaintiff, and for an AFFIRMATIVE DEFENSE to each and every cause of action pleaded therein, this defendant alleges that each and every car referred to in each of the said several causes of action, has been at all times and was on the dates set forth in the complaint of plaintiff, used by this defendant upon its line of street railway.

WHEREFORE, having fully answered the complaint of plaintiff, defendant demands judgment against the plaintiff; that this action against it be dismissed; that it go hence without day and recover of the plaintiff its costs.

(Signed) GRAVES, KIZER & GRAVES,  
Attorneys for Defendant.

State of Washington  
County of Spokane,—ss.

W. G. Davidson, being first duly sworn, on oath deposes and says: that he is one of the officers of the Spokane & Inland Empire Railroad Company, a corporation, defendant above named, to-wit: its secretary, and as such officer makes this verification for and on behalf of said corporation; that he has read the above and foregoing answer, knows the contents thereof and believes the same to be true.

(Signed) W. G. DAVIDSON.

Subscribed and sworn to before me this 24th day of January, 1912.

(Signed) C. H. SCHWELLENBACH,  
Notary Public in and for the State of  
Washington, residing at Spokane.

(Notarial Seal)



Endorsements: Service of the within answer is hereby acknowledged this 24th day of January, 1912. OSCAR CAIN, U. S. Attorney and Attorney for Plaintiff.

Filed in the U. S. District Court, Eastern District of Washington, March 11, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy.

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*In the District Court of the United States for the Eastern District of Washington, Northern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD  
COMPANY,

Defendant.

REPLY.

Comes now the United States of America, and for reply to the affirmative defense of the defendant to each and every cause of action in the complaint herein, denies each and every allegation, matter and thing contained in said affirmative defenses and each of them.

(Signed) OSCAR CAIN,

United States Attorney.

(Signed) E. C. MACDONALD,

Assistant United States Attorney.

Endorsements: Reply. Filed February 10, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy.

*In the District Court of the United States for the Eastern District of Washington, Northern Division.*

No. 1261.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD  
COMPANY, a Corporation,

Defendant.

VERDICT.

We, the jury in the above-entitled cause, find the defendant guilty of the violation of the Safety Appliance Act as charged in counts numbered thirteen, fourteen and fifteen of the complaint and guilty as to counts from one to twelve inclusive.

(Signed) W. H. COCHRAN,

Foreman.

Endorsements: Verdict. Filed April 18th, 1912.

W. H. Hare, Clerk. By Frank C. Nash, Deputy.

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*In the District Court of the United States, Eastern District of Washington, Northern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD  
COMPANY, a Corporation,

Defendant.

MOTION FOR JUDGMENT.

Defendant moves the Court to enter judgment in its favor, dismissing the action, and for costs, not-

withstanding the verdict returned herein by the jury, for the reason that said verdict is contrary to law and to the undisputed evidence in the case, and under the law and the facts defendant is entitled to judgment, as herein demanded.

(Signed) GRAVES, KIZER & GRAVES,  
Attorneys for Defendant.

Endorsements: Service of the within motion for judgment is hereby acknowledged this-----day of April, 1912.

(Signed) OSCAR CAIN,  
Attorney for Plaintiff.

Motion for judgment. Filed April 18, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy.

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*In the District Court of the United States for the  
Eastern District of Washington, Northern Division.  
No. 1261.*

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD  
COMPANY, Defendant.

OPINION.

Oscar Cain, U. S. Atty.

E. C. Macdonald, Asst. U. S. Atty.

Philip J. Doherty, Special Asst. to U. S. Atty.

Graves, Kizer & Graves, for defendant.

RUDKIN, District Judge. The present action was instituted by the United States Attorney for this district upon the suggestion of The Attorney General



of the United States, and at the request of the Interstate Commerce Commission, to recover penalties for violations of the Safety Appliance Act of March 2, 1893, as amended by the Acts approved April 1, 1896 and March 2, 1903 (27 Stat., 531; 29 Stat., 85; 32 Stat., 943).

The complaint contains fifteen causes of action in all, the first twelve for using in interstate commerce certain cars which were not provided with secure grab irons or handholds in the ends and sides of the cars for greater security of men in coupling and uncoupling the cars as required by section four of the Act, and the last three for permitting the hauling and using in interstate commerce of cars not equipped with couplers coupling automatically by impact and which could be uncoupled without the necessity of men going between the ends of the cars as required by section two. The jury returned a verdict of guilty under the testimony as to the first twelve causes of action and a like verdict, by direction of the Court, as to the remaining three causes of action, and the defendant has interposed a motion for judgment notwithstanding the verdict. The sole ground of the motion is, that the cars in question were used upon street railways, within the meaning of the exception or saving clause embodied in the amendment of 1903, which exempts from the provisions of the act certain cars exempted by a prior amendment "or which are used upon street railways."

32 Stat., 943, *supra*.

The claims of the respective parties may be thus briefly stated. The government contends that the saving clause excludes from the operation of the act only such cars as are used exclusively on street railways, or what might be styled street cars proper, while the defendant contends that all cars which are habitually operated over street railways are excluded, even though they are so operated for a small part of their journey only. This latter construction would, of course, exclude from the operation of the act practically all interurban trains, for it is conceded that such trains are usually, if not uniformly, operated over the street railways in the cities between which or through which they run. For the purpose of this opinion it would perhaps be a sufficiently definite description of the defendant's railway system to say that it differs in no respect from the interurban railways operated so extensively throughout the country. The company owns and operates a street railway system in the city of Spokane, and two or more interurban lines, one of which extends from the city of Spokane, in the State of Washington, to Coeur d'Alene city, in the State of Idaho, and is engaged in interstate commerce. The cars in question were hauled over this latter line. The passenger depot is in the heart of the city of Spokane and passenger trains run from this depot over the street railway tracks to the private right-of-way of the company, a distance of a mile or more. From the latter point the trains run over the company's private right-of-way to Coeur d'Alene city, a distance of about thirty miles.

The cars differ little from the passenger coaches in common use on all commercial railways. They are usually operated in trains and run at a high rate of speed. The trains run on schedule time and their movement is controlled by train dispatchers and telegraphic orders in the customary way. Trains take up passengers at different points within the city destined to points without the city and discharge passengers at different points within the city from points without the city, but carry no passengers between points within the city. The trains carry baggage as well as passengers, and freight trains are operated over the private right-of-way, but not as a rule on the street railway tracks. The cars mentioned in the first twelve causes of action were the interurban cars in common use, while the cars mentioned in the last three causes of action were ordinary street cars, chained together and used on the interurban line in an emergency. For the purpose of the present motion it must be assumed that the first twelve cars were not provided with the grab irons or handholds required by the statute, and it is admitted that the last three cars were not equipped with automatic couplers. The object of the Safety Appliance Act is to protect those engaged in hazardous occupations in which thousands of men are annually maimed and killed, and there is nothing in the record to indicate that there is less hazard in the operation of an interurban train than any other. Indeed, the chief difference between the interurban train of the present day and the train operated over the steam



railway lies in the motive power. Nor has any satisfactory reason been suggested why interurban roads can not readily comply with all the requirements of the Safety Appliance Act, or why trains so equipped can not operate over street railways, if need be. True, the grab irons or handholds cannot be placed beneath the cars now in use, as required by the order of the Interstate Commerce Commission made pursuant to the Act of Congress of April 14, 1910 (36 Stat., 298) because the long swing of the draw bar in turning street cars will either break the handholds or grab irons from the car or throw the car from the track. But the order in question was not in force at the time of the use of the cars here complained of, and it is not to be presumed that the Interstate Commerce Commission will make regulations which are either unreasonable or unnecessary; and if it has done so, it is not to be presumed that it will refuse to modify such regulations on proper application and showing. In any event, a regulation made by the Interstate Commerce Commission under an Act passed in 1910, can have but little bearing on the construction of an Act passed in 1903. It was urged in argument that a great many interurban railways were under construction at the time of the passage of the Act of 1903 and that Congress had such roads in view when it employed the expression, "used on street railways." It seems to me that if Congress had such roads in mind it would have described them more definitely than by referring to a mere incident to their main or principal use. The term "used"

means "employed for a purpose," and imports a certain degree of permanence.

Section seven of the Act of Congress of March 3, 1851, entitled, "An Act to limit the liability of ship owners and for other purposes," contained the following exception or saving clause.

"This Act shall not apply to the owner or owners of any canal boat, barge, or lighter, or to any vessel of any description whatever, used in rivers or inland navigation."

And in construing the term "used" in *Moore v. American Transportation Company*, 24 How., 1, the Court said:

"This word *used* means, in the connection found, *employed*, and doubtless, in the mind of Congress, was intended to refer to vessels solely employed in rivers or inland navigation."

So here, Congress intended to exclude from the operation of the Act such cars only as are used solely on street railways. This construction is reasonable and none too liberal. The exception or saving clause must be construed strictly and no other construction will give full effect to the objects and purposes which Congress had in view. The first twelve cars mentioned in the complaint were therefore not used on street railways within the meaning of the law, and it is needless to say that street cars cannot lawfully be chained together and used for the purpose of carrying passengers in interstate commerce.

The motion for judgment notwithstanding the verdict is denied.

Endorsements: Opinion denying Motion for Judgment notwithstanding the Verdict. Filed in the U. S. District Court, Eastern District of Washington, September 16, 1912. W. H. Hare, Clerk.

*In the District Court of the United States, Eastern  
District of Washington, Northern Division.*

No. 1261.

UNITED STATES OF AMERICA.

Plaintiff,

VS.

SPOKANE & INLAND EMPIRE RAILROAD  
COMPANY, Defendant.

# PETITION FOR A NEW TRIAL.

Defendant prays the Court to grant it a new trial in the above-entitled action for the following causes:

1. Insufficiency of the evidence to justify the verdict returned herein. The evidence was insufficient to justify the verdict for the reasons:

(a) That it appears that the cars referred to in plaintiff's complaint and in the evidence herein were cars which are used upon a street car line, and being so used do not come within the operation of the Act of Congress relied upon, and on account of the alleged violation of which recovery was sought herein.

(b) That it appears that the hand-holds, or grab-irons in the buffer or sill at the ends of such cars were sufficient within the meaning of the Act of Congress relied upon, and that if the cars do come within the purview of such act, there was no viola-



tion thereof because the appliances above referred to were sufficient.

2. Error in law occurring at the trial and excepted to at the time by the defendant. The particular errors relied upon are:

(a) The exclusion of the testimony of skilled and experienced railway men who had examined the cars in question and of whom plaintiff inquired as to the sufficiency of the hand-holds in the buffers or sills of such cars.

(b) Rejecting defendant's offer to prove by skilled and experienced railway men who had examined the cars in question that the hand-holds or grab-irons in the buffers or sills of such cars were sufficient to accomplish the purpose intended to be accomplished by the provisions of the act, and better than those commonly in use upon the cars used in interstate commerce.

(c) In denying defendant's motion for a non-suit.

(d) In denying defendant's motion to instruct the jury to return a verdict in defendant's favor.

(e) In instructing the jury to return a verdict of guilty against the defendant on the last three counts of the complaint.

This petition is based and will be heard upon the pleadings herein, upon the record of the Court, of the minutes of the Court, and the bill of exceptions prepared by defendant.

(Signed) GRAVES, KIZER & GRAVES,  
Attorneys for Defendant.

Endorsements: Service of within petition for new trial is hereby acknowledged this 10th day of October, 1912.

(Signed) OSCAR CAIN,  
United States Attorney.

Petition for New Trial. Filed October 10, 1912.  
W. H. Hare, Clerk. By S. M. Russell, Deputy.

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*In the District Court of the United States, Eastern  
District of Washington, Northern Division.*

No. 1261.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD  
COMPANY,

Defendant.

OPINION.

Oscar Cain, U. S. Atty.

E. C. Macdonald, Asst. U. S. Atty.

Philip J. Doherty, Special Asst. to the U. S. Atty.

Graves, Kizer & Graves, for defendant.

RUDKIN, District Judge. The defendant has interposed a motion for a new trial in this case, and a proper understanding of the question thus presented calls for a somewhat more extended statement of the facts than is contained in my former opinion. As there stated, the first twelve causes of action are based on the use of certain cars in interstate commerce which were not provided with secure grab-irons or hand-holds in the ends and sides of the

cars for the greater security of men in coupling and uncoupling cars, as required by section four of the Safety Appliance Act. That which the defendant claims served the purpose of hand-holds or grab-irons and satisfied the requirements of the statute may be thus described. The end of the interurban car in question is circular in form so that the trains may turn street corners while operating on the city streets. The iron base of the car extends a few inches beyond the body of the car itself and is six or seven inches in depth though not entirely solid. On either side of the draw-bar there is an opening in this angle iron approximately twenty inches in length and two inches in width, leaving an iron plate or bar two or three inches in width in front of the opening. These openings, the defendant contends, constitute sufficient hand-holds or grab-irons to comply with the requirements of the statute. On the foregoing facts the defendant called a number of experienced railroad men as witnesses and offered to prove by them that the openings in the angle iron were as safe and serviceable as the hand-holds or grab-irons in common use on commercial railways. An objection interposed to this offer was sustained by the Court and that ruling is the only error assigned at this time.

The purpose of the hand-hold is obvious. As declared by the statute, it is for the greater security of men in coupling and uncoupling cars. In order to subserve that purpose it must be located at the proper place; it must be located so that it can be seen, and it must be of such form and size that it



can be readily seized in an emergency. Whether it satisfies these requirements is not, in my opinion, a matter for experts to determine, but is within the common knowledge of all men of ordinary intelligence. It would be idle to attempt to review the wilderness of authority bearing upon this question and I will not attempt it, for, as said by the Court in *Graham v. Pennsylvania Company*, 139 Pa. St., 149, the number of such decisions "may be said not only to have become legion, but legion against legion." The question in every case is addressed to the sound discretion of the court, and, except in cases of necessity, witnesses should not be permitted to express an opinion upon the main issue in the case. To do so is a plain invasion of the province of the jury. The jury in this case heard the testimony and by consent of parties viewed and inspected the so-called hand-holds in question as well as the hand-holds in use on one of the steam railways passing through the city; and from such view in the light of the testimony they were better able to determine the issue correctly than if it had been clouded and obscured by the biased opinions of partisan experts.

The motion for new trial is denied.

Endorsements: Opinion Denying Motion for New Trial. Filed October 31, 1912. W. H. Hare, Clerk.  
By Frank C. Nash, Deputy.

*In the District Court of the United States, Eastern  
District of Washington, Northern Division.*

1261.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD  
COMPANY,

Defendant.

### JUDGMENT.

The above-entitled cause having come on for trial on the 17th day of April, A. D. 1912, the plaintiff appearing and being represented by Philip J. Doherty, Esquire, Special Assistant United States Attorney, and Oscar Cain, United States Attorney for the Eastern District of Washington; the defendant, Spokane & Inland Empire Railroad Company, appearing and being represented by Graves, Kizer & Graves, its attorneys, and a jury having been duly and regularly impaneled, the case proceeded to trial, witnesses examined on behalf of the parties hereto, and the Court having listened to the argument of counsel for the respective parties, and having directed a verdict for the plaintiff as to counts 13, 14 and 15, and having submitted to the jury the matters contained in counts 1 to 12 inclusive, of the complaint filed herein, a verdict of guilty was returned, whereupon a motion for judgment *non obstante veredicto* was filed by the defendant, which motion was denied by the Court on September 17th, 1912, whereupon the defendant filed its motion for a new trial, the

same having come on for argument before the Court on the 30th day of October, 1912, and taken under advisement, and the Court having filed on the 31st day of October, 1912, his decision denying said action; it is therefore,

ORDERED and ADJUDGED that the defendant Spokane & Inland Empire Railroad Company be, and the same is hereby fined in the sum of Fifteen Hundred (\$1500.00) Dollars, being One Hundred (\$100.00 Dollars for each cause of action set forth in the complaint; and it is further

ORDERED and ADJUDGED that the plaintiff, United States of America, do have and recover of and from the defendant, Spokane & Inland Empire Railroad Company, its costs and disbursements herein to be taxed.

Done in open Court this 2nd day of November, A. D. 1912.

(Signed) FRANK H. RUDKIN,  
Judge.

Endorsements: Judgment. Filed November 2, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy.



*In the District Court of the United States, Eastern  
District of Washington, Northern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD  
COMPANY,

Defendant.

ORDER EXTENDING TIME.

The time for moving for a new trial and for filing the bill of exceptions is extended until June 1, 1912, and either party hereto may file a bill of exceptions herein on or before that date.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: Order Extending Time. Filed April 20th, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy.

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*In the District Court of the United States, Eastern  
District of Washington, Northern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD  
COMPANY, a Corporation,

Defendant.

STIPULATION.

IT IS STIPULATED that the defendant may have until August 1, 1912, to petition for a new trial herein, and that either party may have until

that time in order to prepare and file a bill of exceptions herein, and that an order accordingly may be entered.

Dated this 31st day of May, 1912.

(Signed) OSCAR CAIN,

Attorney for Plaintiff.

(Signed) GRAVES, KIZER & GRAVES,

Attorneys for Defendant.

Endorsements: Stipulation. Filed June 1, 1912.

W. H. Hare, Clerk. By S. M. Russell, Deputy.

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*In the District Court of the United States, Eastern  
District of Washington, Northern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD  
COMPANY, a Corporation,

Defendant.

ORDER.

Upon the stipulation of the parties, it is ordered that either party shall have until August 1, 1912, within which to prepare and file a bill of exceptions herein, and that the defendant shall have until that time within which to present its petition for a new trial, should it be so advised.

Done in open Court this 31st day of May, 1912.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: Order. Filed June 1, 1912. W.  
H. Hare, Clerk. By S. M. Russell, Deputy.

*In the District Court of the United States, Eastern  
District of Washington, Northern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD  
COMPANY,

Defendant.

STIPULATION.

It is stipulated between the parties hereto that the time of filing the petition for a new trial, of filing the bill of exceptions and for the Court to decide and pass upon the motion for judgment *non obstante veredicto*, and the motion for a new trial if the motion for judgment *non obstante veredicto* is denied, be continued over the term until November 1, 1912.

(Signed) OSCAR CAIN,

U. S. District Attorney.

(Signed) GRAVES, KIZER & GRAVES,

Attorneys for Defendant.

Endorsements: Stipulation. Filed August 29, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy.



*In the District Court of the United States, Eastern  
District of Washington, Northern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD  
COMPANY,

Defendant.

ORDER.

Upon the stipulation of the parties hereto, it is ordered that the time for filing the petition for a new trial herein, the time for filing a bill of exceptions and the time in which the Court may consider and pass upon the motion for judgment *non obstante veredicto* now pending before it, shall be and hereby are continued over the term and until November 1, 1912; and that whatever the ruling upon the motion for judgment *non obstante veredicto* the other steps heretofore referred to may be taken before that time.

Done in open Court this 29th day of August, 1912.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: Order. Filed August 29, 1912.  
W. H. Hare, Clerk. By S. M. Russell, Deputy.

*In the District Court of the United States, Eastern  
District of Washington, Northern Division.*

No. 1261.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD  
COMPANY,

Defendant.

ORDER.

It is ORDERED that the defendant shall have  
until January 1, 1913, within which to prepare and  
file a bill of exceptions in the above-entitled cause.

Dated October 18, 1912.

(Signed) FRANK H. RUDKIN,  
Judge.

Endorsements: Order. Filed October 19, 1912.  
W. H. Hare, Clerk. By Frank C. Nash, Deputy.

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*In the District Court of the United States for the East-  
ern District of Washington, Northern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD  
COMPANY,

Defendant.

BILL OF EXCEPTIONS.

BE IT REMEMBERED that the above entitled  
cause came on for hearing in the above entitled Court  
on Wednesday, April 27, 1912, before the Honorable

F. H. Rudkin, judge presiding, plaintiff being represented by its attorneys, Oscar Cain, district attorney, and Philip J. Doherty, Esq., and the defendant being represented by its attorneys, Graves, Kizer & Graves, and the following proceedings were had, to-wit:

The jury was empaneled and sworn according to law, and thereupon the plaintiff, to sustain the issue upon its part, offered the testimony of the following witnesses as its evidence in chief:

GEORGE B. WINTER, being duly sworn, testified as follows:

"I am a safety appliance inspector for the Interstate Commerce Commission, and on October 23, 1911, made an inspection of the cars of the Spokane & Inland Empire Railroad Company in Spokane. I inspected passenger coach 304, and found that both end handholds on both ends of the car were missing. I mean by hand-holds what are commonly known by railroad men as grab-irons. They are placed usually on the end sill of the car for the protection of the men in coupling and uncoupling hose. It is customary to have four hand-holds, one on each side of the coupler, and two on each end, and these were all missing. This was a passenger car in a train with other cars. At this point it was admitted that the train in which this car was placed was destined for Coeur d'Alene, Idaho, and was run through to that place; that it was run outside of the city limits of Spokane over the private right of way of the Spokane & Inland Empire Railroad Company, over a highway of Interstate Commerce. It was also admitted that the car



and the train in which it was run from the passenger station in Spokane through the streets of that city over the street railway lines of the company to the point where the private right of way of the company was reached and from there it was run on such private right of way to Coeur d'Alene.) I examined that car afterwards at Allan, Idaho, and it was in the same condition at that time. (It was admitted by defendant that the other cars referred to in the first twelve counts of the complaint were in the same condition with respect to hand-holds as was car 304 concerning which the witness testified, and that it was unnecessary to produce testimony as to each of the twelve cars). Coming to count 13 of the complaint, I examined three cars in train extra No. 4 of the Spokane & Inland Empire Railroad Company. Motor and coach No. 4 and coach No. 50, and Motor and coach No. 10 had what are commonly known as link and pin couplings. In order to couple these cars, it would be necessary for a man to go between them and use the link and pin. I rode on this train to Allan, Idaho. It was a passenger train. (Defendant admitted that the same condition was true as to the cars referred to in the last two counts of the complaint.) The trains of defendant company leave from the depot in the city and the motor car or motor and baggage was the first car. Then the other cars, whether there were two or three, were coupled to it in consecutive order. These trains went out over the street-car tracks. They are operated by train orders and made up with markers, as required

by the standard rules. Some of them handle baggage and express. Freight is handled over the line in freight cars. In going out from the terminal station in Spokane, these trains go eastward over one of the main thoroughfares of the city, and run by the brewery and the Northern Pacific round house, across two Spokane river bridges, and then parallel to the Northern Pacific towards Coeur d'Alene. I believe that route is the direct route out of the terminal station. It might be considered so.

#### CROSS-EXAMINATION.

The cars handling freight are not brought down to the passenger station over the city streets. They stop at the freight terminals, and the cars handling freight are not run over the street railway line. This road is an electric railroad operated by trolley cars, and the cars are run from the yards of the company over street railway lines through the streets of the City of Spokane from the freight yards of the company down to the passenger station. They are operated over street railway lines, tracks laid in the street over which street railway cars run. The front of the cars which I inspected were constructed in a different manner from that of cars used on the steam railroads, due to the curvature, necessitating the car going around street angles. There is a radial coupler and a heavy steel sill that is round on the corners. That radial coupler swings from one side to the other across the whole front of the car. It is necessary that it should do so, and that the corners should be rounded so that the cars can make the turns on

the street railway lines. The cars used on steam railroads are practically square. The sill or buffer under which the coupler swings is not found on steam cars. In that buffer or sill on each side of the coupler, measuring from 18 to 22 inches in length and from  $2\frac{1}{4}$  to 3 inches of clearance, and about 25 or 26 inches from the center of the car, is an opening. There was such an opening on each side of the coupler. Those openings were on each end of all the coaches and most of the motors. The baggage and mail car has a solid sill, but on all the coaches and motor-cars used for passenger business I found those openings. I observed the cars that I have referred to and which were not equipped with the automatic coupler. They were ordinary traction cars, small in construction. I would consider it a street car. It would be impossible to equip such a car with automatic couplers." (Thereupon it was admitted that all of the cars referred to in the complaint moved on the day alleged in the complaint, and that inspector Hayes, if called, would testify as to the condition of the cars in all respects, both upon direct and cross-examination, as inspector Winter had testified).

Thereupon the plaintiff rested, and the defendant to sustain the issues upon its part then offered the testimony of the following witnesses as its evidence in chief.

W. C. MOCK, being duly sworn, testified as follows:

"I am the resident engineer of the Spokane & Inland Empire Railroad Company. The cars of that



company in coming down from its freight yards to its passenger station are obliged to pass around a number of curves in the street. At Market street there is about a 36 degree curve. At the corner of Market and Main, where the street railway line turns from Market street into Main, there is a 73 degree curve. At the passenger station where the line turns from Main avenue into Lincoln street, there is practically a 100 degree curve. The maximum curve used on steam railways does not go much over a 4 degree curve, though on difficult construction a 10 degree to 14 degree curve is used, but that is the limit, while on the street railway line over which these cars are running to and from the freight yards down to the passenger station, you get from a 36 degree curve up to 100 degrees. The coupler that is used on these cars swings clear across the car from one side to another under the end sill or buffer of the car. It is necessary that it should be made to so swing because of the extremely short curves on the city streets going into the passenger station. Over the top of the buffer is an angle iron,  $3\frac{1}{2}$  inches wide and 9 inches high, and of half inch material, that extends across the end of the car. On either side of the coupler there is an opening in this angle iron which is  $22\frac{1}{2}$  inches long and  $2\frac{1}{2}$  inches wide and is back  $3\frac{1}{2}$  inches from the front of the buffer."

#### CROSS-EXAMINATION.

"The cars were not made according to my designs, and I do not know whether the openings were constructed for any particular purpose. All the passen-

ger coaches were uniformly equipped, as I have stated. There are no solid sills on passenger coaches, though there are on motors, motors and baggage cars which are sometimes used in passenger trains."

EDWARD E. LILLIE, being duly sworn, testified as follows:

"I am the superintendent of the defendant company in charge of its interurban system. I have been engaged in railroad work for 29 years in positions from telegraph operator to superintendent. The lines of the defendant company are operated by electricity. One line extends from Spokane to Coeur d'Alene, and then to Hayden Lake, Idaho. Another line from Spokane to Moscow, Idaho, and a third one from Spring Valley to Colfax, both in Washington. The company owns the city lines known as the Spokane Traction Company within the city limits, and one suburban line running out to Opportunity. Its passenger station is located at the corner of Main and Lincoln, very close to the center of the business part of the city. From the freight yards of the company, the passenger station is reached by all interurban trains by leaving the freight yards where they intersect Market street, using Market street to Main avenue, Main avenue to Lincoln, and Lincoln into the depot. The curves of the street railway lines on these streets are very abrupt, and it would not be possible to have them otherwise under the city ordinances. In making these curves, the coupler swings for almost the entire turn from one side of the car to the other, and so makes the turn in the streets. The

radial coupler is below, and not attached to the buffer or sill that has been spoken of. There is an iron below the buffer which sustains that radial coupler. It would not be possible to use these cars on the street railway lines over the city streets if the hand-holds or grab-irons were put below the buffer because the swing of the draw-bar, in turning the curves, would break them off. Prior to the act giving the Interstate Commerce Commission power to prescribe uniform systems of safety appliances, there was no uniformity in the grab-irons, or hand-holds, that were placed upon cars. Some put grab-irons on in one place, and some in another. But there was no uniformity with respect to their use, location, or anything of that sort. In the top of the buffer on these cars there is an opening in the angle iron about 22 inches long, 2 or 3 inches wide, and set back from the front of it about  $3\frac{1}{2}$  inches. From my experience as a railroad man, that opening would serve the purpose of a hand-hold. There is no other reason for it being there. The company has had some correspondence with the Interstate Commerce Commission relative to the form of hand-holds or grab-irons that should be put on the cars, and has made an effort to put some different form of hand-hold on than these openings. It does not comply with the requirements of the Interstate Commerce Commission for they require the hand-hold to be turned down, which would be impossible on these cars because the radial coupler, in making the swing at the curves would break them off. What we have at-



tempted to put on is turned up instead of down. The cars referred to in the last three counts of the complaint, Inland Empire cars 4, 10 and 50, which are not equipped with an automatic coupler are a small interurban type of car used at the present time in the city limits. They are a large street-car. The trucks are low, the bodies are low, the draw bar being not over 18 inches from the rail, and it would not be possible to equip them with automatic couplers because the clearance would not be sufficient. These cars were used in interurban business on October 23d due to very heavy pressure of business caused by the race meeting at Allan, Idaho. They were made up in the shops at Spokane, and run solid from Spokane to Allan, Idaho, and from Allan back to Spokane. The trainmen were not required to and did not go between the cars to couple and uncouple them between the points mentioned. It would not be possible to couple these cars into a train with other cars. They must be left by themselves. It is a class of car to itself."

#### CROSS-EXAMINATION.

"The route over which these cars pass in coming into and out of the terminal station is the most direct route that could be taken. The same tracks that are used in the city streets are also used by our street cars. The track is a standard gauge 4 feet 8½ inch, and practically the standard weight of rail. It is substantially the same as the track on the interurban system except that we could not operate on any such curve on outside lines as there are in the city.

So far as the gauge is concerned, these trains are the same as the steam railroads. My superintendency is over the interurban lines. I do not control the street railway lines. On the interurban lines, tickets are sold for particular stations, the same as a railroad. We handle baggage for our passengers. Our trains are made up according to standard railroad rules with markers to designate the trains, and are run on schedules and by train orders. The employes who are engaged in the street car service do not have anything to do with the operation of the interurban service. They use the same tracks, however, that come from the freight depot to the passenger terminal in the heart of the city. We do not take passengers on the interurban trains within the city limits exclusively. We receive passengers at points within the city limits for transportation outside, and drop passengers on the interurban trains at various points within the city. But within the city limits we do no strictly street car business. I am familiar with the Master Car Builders' Book of Rules. It did not contemplate electric railways. According to that book of rules, the end sill has no connection with a handhold. I never saw an end sill like those on these cars before. I never saw on a steam railroad an end sill similar to what we have on the electric railroad. I never heard anyone describe them as a hand-hold. The openings in the end sills provide an absolute grab of the fingers, the hand. In addition to that you have got the full weight of the hand resting on the top in case you should lose your foot-

ing and be dropped. The man who is employed in coupling an air hose on such a train, and the train starts, could get something more than the ends of his fingers into that opening. I have tried it standing up, but never when I was stooping down in the position a man would be in who was coupling the hose. I have had no actual experience using it in actual coupling or uncoupling, but I have seen the process done many times. The purpose of a handhold is to afford security to a man who is between the cars if for any reason they should start. It is necessary for men to go between the cars and stoop down to connect the air hose and the electric light and heating wires. The man who is down between the cars is within four or five inches of the ground with his hands. If the car starts, he has to reach up 37 or 38 inches from the ground to get to the top of the end sill, and has to place his hand  $3\frac{1}{2}$  inches over the top of the sill if he reaches the opening, and then turn it an inch or three-quarters before he can get enough to grab on. I would not say that he could get nothing but the ends of his fingers in if he is stooping down and suddenly has to grab to save his life, but I don't believe I could get much more than the ends of my fingers up there myself."

RE-DIRECT.

"The Spokane & Inland Empire Railroad Company owns both the street railway lines and the interurban lines, but has two superintendents, one for its street railway lines and another for its interurban lines. The stops on our interurban lines are from



three to a mile to one for every mile, being nearer together as the city is approached. We do a local business, picking up people at cross-roads, bring them in and taking them back. In going out of and coming into town on the street railway lines on the city streets, we stop at all intersecting lines to take on and discharge passengers. The street railway lines are used for about a mile and a quarter."

RE-CROSS.

"The cars in street railway service are generally operated singly, but not always so. Generally, two or more cars are used in the interurban service, though at the present time we are running some single cars."

B. S. ROBERTSON, being first duly sworn, testified as follows:

"I am a railroad conductor, and have been in the employ of the Great Northern Railway for 23 years as brakeman, switchman, yardmaster, and conductor. I have had a great deal of experience in coupling and uncoupling cars, and in going between them, and am familiar with the types of hand-holds provided ordinarily on steam railroads for the security of men going between the cars. In a general way, there is uniformity in such appliances and the place of their location. The Great Northern coaches have hand-holds on the ends of the cars, and no strips. The baggage cars have strips and no hand-holds on one side of the draw bar. Where there is a hand-hold on passenger coaches on steam roads, it is about midway from the bottom of the wooden sill to the bottom of the car above the track. The hand-

holds that are used on steam railroads are about the height of my shoulder above the track. I am 5 feet 10 or 11 inches, and the hand-hold would strike me just about the shoulder. I have examined the passenger coaches on the Spokane & Inland Empire Railroad Company with reference to the openings which it claims is a hand-hold in the buffer or sill of their cars."

Thereupon, counsel for defendant asked the witness then on the stand this question.

"What would you say of them as a safe and proper appliance; one that would tend to preserve men from injury who might have to go between the cars for any purpose,"

Plaintiff's counsel thereupon objected to the question, stating that "the question is, is it a hand-hold," The Court sustained the objection "on the ground that it invades the province of the jury;" that defendant was seeking to prove by the witness the very question that the jury were to decide. Counsel for defendant thereupon made the following offer of proof:

"Now, if your honor pleases, I offer to prove by the witness on the stand, and I will call other witnesses, and particularly experienced railroad men, of years of experience, to prove by him and by them, by questions and answers addressed to them, that the opening in the beam or buffer of these electric cars is intended to subserve and does subserve the same purpose as the round iron appliance that is prescribed by the rules of the Inter-

state Commerce Commission at the present time and is in use on steam railroads, that it is a better appliance than these are for the purpose of protecting men from injury who have to go between the cars. I offer to prove that and to ask questions of this witness to that effect."

Thereupon counsel for plaintiff objected to the offer, and the Court sustained the objection upon the ground that it was not a question for expert testimony, but was a matter of common knowledge. Whereupon defendant asked and was allowed an exception and the witness was excused.

ARLINGTON MAHAN, being duly sworn, testified as follows:

"I am general foreman in the shops of the Spokane & Inland Empire Railroad Company. I am familiar with the passenger coaches of that company that have a buffer at the end and an opening in it. I was in the employ of the company at the time these cars or some of them were purchased. The openings were in the beam or sill when the cars were received. There were hand-holds up and down on the sides of the cars when they were received. There were none on the ends of the cars in the place they are put on steam cars. I know of no reason for the openings on top of the angle iron on that beam. The men use them for grab-irons whenever they have occasion to couple or uncouple cars, or go between them. I have had occasion to couple and uncouple cars in that yard and other yards."



Thereupon counsel for defendant asked the following question:

“Does that opening in the top of the sill serve the same purpose and is it as well fitted for the purpose of protecting the lives and limbs of men who have occasion to go between the cars in the exercise of their duties as the form of grab-irons that is used on steam cars, that is brought below the end of the car.”

Counsel for plaintiff objected to the question, and the Court sustained the objection on the following grounds:

“I am of the opinion that this is one of the cases where witnesses must state facts and not conclusions, whether that is a reasonably safe appliance is within the knowledge of the ordinary man and no special experience is required.”

Thereupon defendant asked and was allowed an exception to the ruling. The witness further testified:

“I am familiar with the form of grab-iron or hand-hold that is used on the passenger cars of steam railroads. It is attached to the end of the car, one on each corner, and projects downward. The Interstate Commerce Commission requires that they shall have a clearance of at least two inches, preferably two and a half, below the car sill. The handle runs different lengths. The Interstate Commerce Commission requires that it shall be not less than 16 inches inside clearance. There is one of these on each side of the draw bar. The opening

in the angle iron in that buffer on the Spokane & Inland Empire cars runs in length from 16 to 24 inches. It is from  $2\frac{1}{2}$  to  $2\frac{3}{4}$  inches wide, and there is one of such openings on each side of the draw bar on both ends of the car, making four in all. It would be impossible to put on the passenger cars of the defendant such grab-irons as are in use on the cars of steam railroads because in going around the curves on the city streets the coupler would strike a brake."

And thereupon the following question was asked, and the following matters occurred:

"In your opinion, Mr. Mahan, and observation of these cars, is the opening in the angle bar a better and safer appliance for the safety of persons having occasion to go between the cars in the discharge of their duties than those that are used upon steam railroads?"

MR. DOHERTY: The question is objected to.

THE COURT: I will sustain the objection.

MR. GRAVES: To which we take an exception.

MR. GRAVES: I now offer to prove by this witness and also by other witnesses called, with your Honor's permission, that the opening in this angle iron or sill or buffer is a better and safer appliance, better protection, greater protection to the men who have occasion to go between the cars than any form of grab-iron or hand-hold that is known in railroad circles.

MR. DOHERTY: I object to that.

THE COURT: Objection sustained on the ground that it is a question for the jury.

MR. GRAVES: To which the defendant excepts.

CROSS-EXAMINATION.

"The grab-iron or hand-hold used on steam railroads is a long piece of metal affixed to the end of the sill projecting downwards so it can be easily grasped by the hands. There is nothing like that on these cars. I have had steam railroad experience. I have had occasion in my railroad experience to use a grab-iron as a life saving device when I was between the cars coupling an air hose when they started. I was stooping down at the time. It was one of the Inland cars and was in the yards at the time. It did not start so very slowly."

Thereupon the defendant rested and the plaintiff rested also.

The foregoing setting forth and containing all the evidence introduced and offered by the parties to the cause, at its conclusion, both having rested, the defendant challenged the sufficiency of the evidence, moved the Court for a non-suit, and that the cause be taken from the jury and the action dismissed upon all of the counts. Defendant further moved the Court that in the event and only in the event that the Court denied the motion to dismiss as to all the counts, to dismiss as to the last three counts of the complaint, those that charged a failure to equip cars with automatic couplers. The Court overruled both motions, and thereupon the defendant asked and was allowed an exception to such ruling. Before



the jury were charged, the defendant in writing requested the following instructions:

I.

"The plaintiff herein has not made out a case against defendant on any of the causes of action stated in its complaint, and you will therefore return a verdict in defendant's favor."

"In the event that the Court should refuse to give the above requested instruction No. 1, then the defendant requests the Court to give the following instruction:

I.

You are instructed that the plaintiff has made out no case against defendant as to the first twelve causes of action pleaded in its complaint, and as to those causes of action your verdict must be for defendant."

"In the event that the Court shall refuse to give instruction No. 1 hereinabove requested, instructing the jury to return a verdict in defendant's favor, and not otherwise, the defendant requests the Court to instruct the jury as follows:

I.

An act of Congress requires cars which are used in interstate business to be equipped with couplings which will couple automatically by impact, and to be provided with secure grab-irons or hand-holds in the ends and sides of the cars. The act provides, however, that it shall not apply to cars used in interstate commerce which are used upon street railways. I charge you that under this provision there

can be no recovery against defendant for a failure to equip any of its cars which are run over its street railway lines, whether engaged exclusively in handling purely street railway business or not, with the safety appliances enumerated by the act. If you find from the evidence, therefore, that in the operation of its electric railway lines the defendant habitually runs the cars referred to in the several causes of action set up in plaintiff's complaint, or any one of them, over its street railway lines, in order to reach its passenger station, any car so used is exempt from the operation of the act, and you cannot award any recovery against defendant for the failure to equip any car so used with the appliances prescribed by the act."

Counsel for plaintiff and defendant having addressed the jury, the Court instructed the jury as follows:

"Gentlemen of the Jury, section 4 of the safety appliance Act of 1903 provides that "From and after the first day of July, 1905, and until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railway company to use any car in interstate commerce that is not provided with secure grab-irons or hand-holds in the ends and sides of any car, for greater security to men in coupling and uncoupling the cars."

"Section one of the act amended March 2nd, 1903, provides: 'That the Act shall not apply to cars which are used upon street railways.'

“The first question as to whether or not these hand-holds or grab-irons were sufficient presents a question of fact for your consideration.

“The second question, that is, whether the cars were run on a street railway, presents a question of law for the consideration of the Court, which I will determine hereafter.

“As to the requirements of this Act I charge you as follows: The Act of Congress relative to safety appliances provides that railroad cars ‘used in interstate commerce shall be provided with secure grab-irons or hand-holds on the ends and sides of each car for greater safety to men in coupling and uncoupling cars.’ It is charged in the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th and 12th causes of action herein that the cars described in and referred to in said causes of action were without grab-irons or hand-holds at the ends of such cars. The purpose of the act is to afford greater security to men coupling or uncoupling cars by reason of the presence of grab-irons or hand-holds, than would be possible if there were nothing of the sort on the ends of the cars. If you should find from the evidence in this case that although there might not have been on the ends of the cars referred to anything which would be known technically as grab-irons or hand-holds, yet if there were upon the ends of such cars an appliance which could be used as a grab-iron or hand-hold and which would afford as much security to men coupling or uncoupling the cars as would be afforded by having what would



be technically known as grab-irons or hand-holds on the ends of the cars, then your verdict should be for the defendant.

“The law does not require any particular kind of grab-iron or hand-hold to be placed upon the end of the car, but only requires that some such appliance shall be placed there which will afford the person coupling or uncoupling cars equal security with that which would be obtained by the method I have given.

“Gentlemen, you have heard the testimony in this case and you have examined the hand-holds in question, and it is for you to say from that testimony and from your personal examination of the cars whether the appliance provided by this company complies with the Act of Congress; in other words, whether it affords that safety and protection to employes which the law contemplates and requires.

“The burden is upon the Government to establish its case by a preponderance of the testimony. If, from a preponderance of the testimony offered herein you are satisfied that the defendant has not furnished grab-irons or hand-holds as I have defined these terms to you within the meaning of the law, you will find the defendant guilty on the first twelve counts.

“As to the last three counts, you will find the defendant guilty on each count and this Court will determine what effect shall be given to your conclusion hereafter.

“I charge you as a matter of law that these trains were employed in interstate commerce, inasmuch as

they run between the city of Spokane in the state of Washington and Coeur d'Alene City in the state of Idaho."

At the conclusion of the instructions, the defendant excepted to the Court's refusal to instruct the jury to find for the defendant on all the counts, and excepted also to the Court's instructing the jury to find the defendant guilty upon the last three counts, 13, 14 and 15, and its exceptions were allowed. The jury thereupon retired to consider their verdict, and thereafter returned into Court a verdict for the plaintiff finding the defendant guilty upon each and every count of the complaint, and awarding against it a verdict of \$1500 on account thereof.

Thereafter, defendant moved the Court to enter judgment in its favor herein dismissing the action and for costs, notwithstanding the verdict returned herein by the jury, for the reason that the verdict is contrary to law and to the undisputed evidence in the case, and that under the law and the facts defendant was entitled to judgment.

Such motion was overruled, and the defendant asked and was allowed an exception thereto.

Thereafter also the defendant duly served and filed its petition for a new trial, which was as follows:

"Defendant prays the Court to grant it a new trial in this action for the following causes:

"First: Insufficiency of the evidence to justify the verdict herein.

"The evidence was insufficient to justify the verdict for the reason:

"(a) That it appears that the cars referred to in plaintiff's complaint were cars which are used upon a street railway line, and being so used do not come within the operation of the act; also

"(b) Because it appears that the hand-hold or grab-iron in the buffer or sill at the ends of such cars were sufficient within the meaning of the act of congress pleaded in the complaint.

"Second: Error in law occurring at the trial and excepted to at the time by defendant. The particular errors relied upon are:

"(a) The exclusion of the testimony of skilled and experienced railway men to the effect that the hand-holds or grab-irons in the buffers of the cars described in the complaint were sufficient to accomplish the purpose intended to be accomplished by the provisions of the act, and better than those commonly in use upon cars;

"(b) In rejecting its offer to prove the facts last above stated.

"(c) In denying defendant's motion for a non-suit.

"(d) In denying defendant's motion to instruct the jury to return a verdict in its favor.

"(e) In instructing the jury to return a verdict of guilty against defendant on the last three counts in the complaint.

This petition is based and will be heard upon the pleadings herein, and the record made during



the progress of the trial, and upon all the minutes of the Court."

Which motion for a new trial was, after argument by counsel for and against the motion respectively and after due consideration by the Court, overruled.

And now in furtherance of justice and that right may be done, the defendant tenders and presents the foregoing as its bill of exceptions in this case to the action of the Court, and prays that the same be settled and allowed and signed and sealed by the Court, and made a part of the record in this case, and the same is accordingly done this 2nd day of November, 1912.

FRANK H. RUDKIN,  
District Judge.

Endorsements: Bill of Exceptions. Filed November 2, 1912. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

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*In the District Court of the United States, Eastern  
District of Washington, Northern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD  
COMPANY,

Defendant.

### STIPULATION.

IT IS STIPULATED that the bill of exceptions heretofore proposed by defendant and submitted to

plaintiff is correct and may be settled and signed by the trial judge without further delay, the plaintiff having no amendments to propose thereto, and being willing that said bill shall be settled forthwith.

Dated November 1st, 1912.

(Signed) OSCAR CAIN,

Attorney for Plaintiff.

(Signed) GRAVES, KIZER & GRAVES,

Attorneys for Defendant.

Endorsements: Stipulation. Filed November 2, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy.

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*In the District Court of the United States for the Eastern District of Washington, Northern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD  
COMPANY,

Defendant.

ASSIGNMENTS OF ERROR.

Comes now the above named plaintiff, Spokane & Inland Empire Railroad Company, and in connection with its petition for writ of error makes the following assignments of error which it avers were committed by the Court in the trial of this cause and upon which it will rely in its prosecution of the writ of error in the above entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit.

First: The Court erred in excluding the testi-

mony of skilled and experienced railway men experienced in the switching and handling of cars, and who had examined the cars described in the complaint, relative to the sufficiency of the hand-holds on the buffers or sills of the cars as a means of protection to the men who might be required to go between the cars in the process of coupling or otherwise handling them.

Second: The Court erred in rejecting defendant's offer to prove by skilled and experienced railway men accustomed to the handling and coupling of cars, and who had examined the cars described in the complaint, that the hand-holds or grab-irons in the buffers or sills of such cars were sufficient to protect men who might be required to go between the cars in coupling or otherwise handling them, that they were sufficient to accomplish purposes intended to be accomplished by the provisions of the safety appliance act requiring hand-holds or grab-irons to be placed upon the end of cars used in interstate commerce, and that they were better than those commonly used upon cars engaged in interstate commerce.

Third: The Court erred in denying defendant's motion for a non-suit made at the conclusion of all the evidence and that the cause be taken from the jury and the action dismissed upon all the counts.

Fourth: The Court erred in denying defendant's motion to dismiss as to the last three counts of the complaint, those that charged a failure to equip cars with automatic couplers.



Fifth: The Court erred in refusing to give defendant's requested instruction numbered one, to the effect that the plaintiff had not made out a case against defendant on any of the causes of action stated in its complaint, and that the jury should therefore return a verdict in defendant's favor.

Sixth: The Court erred in instructing the jury to find the defendant guilty upon the last three counts of the complaint, thirteen, fourteen and fifteen, wherein the defendant was charged with a failure to equip cars used in interstate commerce with automatic couplers which would couple by impact.

Seventh: The Court erred in denying defendant's motion for judgment notwithstanding the verdict returned by the jury wherein it moved that the Court enter judgment in defendant's favor dismissing the action, and for costs.

Eighth: The Court erred in denying defendant's petition for a new trial.

Ninth: The Court erred in rendering judgment against defendant.

WHEREFORE, defendant prays that the aforesaid errors be corrected and the judgment of the District Court reversed, and that said Court be directed to set aside the judgment heretofore entered in plaintiff's favor and enter judgment in defendant's favor, dismissing the action, or if it be deemed that such relief is not grantable, that the cause be remanded for a new trial.

(Signed) GRAZES, KIZER & GRAVES,  
Attorneys for Defendant.

Endorsements: Service of the within Assignment of Error is hereby acknowledged this 18th day of February, 1913.

(Signed) OSCAR CAIN,  
U. S. Attorney.

Assignment of Errors. Filed February 18, 1913.  
W. H. Hare, Clerk. By Frank C. Nash, Deputy.

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*In the District Court of the United States, for the Eastern District of Washington, Northern Division.*  
UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD  
COMPANY,

Defendant.

PETITION FOR WRIT OF ERROR.

To the Honorable Judges of the United States Circuit Court of Appeals, Ninth Judicial Circuit:

Comes now the above named defendant Spokane & Inland Empire Railroad Company, by its attorneys, and complains that in the record and proceedings had in this cause and in the order of the Court denying defendant's motion for judgment in its favor and in entering judgment in plaintiff's favor, and in all the matters and things complained of in the assignments of error filed herein in aid of this petition for a writ of error, manifest error appears to the wrong and injury of this defendant. Your petitioner presents herewith assignments of error wherein are set forth the errors alleged to have been committed by the

District Court in the trial of this cause, and of which it will complain in the prosecution of a writ of error.

WHEREFORE, defendant prays for the allowance of a writ of error to the said District Court and for an order fixing the amount of the bond to be given thereon, and for such other orders and processes as may cause the same to be corrected by the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated this 18th day of February, 1913.

(Signed) GRAVES, KIZER & GRAVES,  
Attorneys for Defendant.

Endorsements: Service of the within Petition for Writ of Error is hereby acknowledged this 18th day of February, 1913.

(Signed) OSCAR CAIN,  
U. S. Attorney.

Petition for Writ of Error. Filed February 18, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

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*In the District Court of the United States, for the Eastern District of Washington, Northern Division.*

UNITED STATES OF AMERICA,

vs.

Plaintiff,

SPOKANE & INLAND EMPIRE RAILROAD  
COMPANY,

Defendant.

ORDER ALLOWING WRIT OF ERROR.

The defendant Spokane & Inland Empire Railroad Company having this day filed its petition for



a writ of error from the judgment heretofore entered herein against it to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, together with an assignment of errors specifying the matters of which complaint is made and of which it will complain, all within due time, and also praying that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error.

NOW, THEREFORE, it is ordered that a writ of error be and hereby is allowed for the purpose of review in the United States Circuit Court of Appeals from the Ninth Judicial Circuit of the judgment heretofore entered herein, and of all proceedings in said cause, and that the amount of bond on said writ of error be and hereby is fixed at five hundred (\$500) dollars.

Dated this 18th day of February, 1913.

(Signed) FRANK H. RUDKIN,  
Judge.

Endorsements: Service of the within Order Allowing Writ of Error is hereby acknowledged this 18th day of February, 1913.

(Signed) OSCAR CAIN,  
U. S. Attorney.

Order Allowing Writ of Error. Filed in the U. S. District Court for the Eastern District of Washington, February 18th, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

*In the District Court of the United States, for the Eastern District of Washington, Northern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD  
COMPANY,

Defendant.

WRIT OF ERROR.

(Lodged Copy.)

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable, the Judge of the District Court of the United States for the Eastern District of Washington, Northern Division, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between the Spokane & Inland Empire Railroad Company, plaintiff in error, and the United States of America, defendant in error, manifest errors have happened to the great wrong and injury of the Spokane & Inland Empire Railroad Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and complete justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal and distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit,

together with this writ so that you have the same at the city of San Francisco in the State of California, on the 18th day of March next in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the HONORABLE EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, the 18th day of February, in the year of our Lord one thousand nine hundred and thirteen.

W. H. HARE,

Clerk of the District Court of the United States for the Eastern District of Washington, Northern Division.

(Seal.)

By Frank C. Nash, Deputy.

Endorsements: Service of the within Writ of Error is hereby acknowledged this 18th day of February, 1913.

(Signed) OSCAR CAIN,

U. S. Attorney.

Writ of Error (Lodged Copy.). Filed February 18, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.



*In the District Court of the United States, Eastern  
District of Washington, Northern Division.*

No. 1261.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD,  
COMPANY,

Defendant.

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS:

That we, Spokane & Inland Empire Railroad Company, as principal, and American Surety Company of New York, a corporation duly authorized under the laws of the State of Washington and of the United States to become surety on bonds in such cases, as surety, are held and firmly bound unto the United States of America in the sum of Five Hundred (\$500) Dollars to be paid to it, and for the payment of which sum well and truly to be made we bind ourselves, and each of us, and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our hands and dated this 18th day of February, 1913.

The condition of the foregoing bond is such that WHEREAS, in the District Court of the United States in and for the Eastern District of Washington, Northern Division, in an action pending in said Court between the United States of America, as plaintiff, and the Spokane & Inland Empire Railroad Company, as defendant, a judgment was entered



The foregoing bond approved this 18th day of February, 1913.

(Signed) FRANK H. RUDKIN,  
Judge.

Endorsements: Service of the within Bond on Writ of Error is hereby acknowledged this 18th day of Feb., 1913.

(Signed) OSCAR CAIN,  
U. S. Attorney.

Bond on Writ of Error. Filed February 18th, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

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*In the District Court of the United States, for the Eastern District of Washington, Northern Division.*  
UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD  
COMPANY,

Defendant.

CITATION.

(Lodged Copy.)

UNITED STATES OF AMERICA: ss.

The President of the United States of America, to the United States of America, plaintiff, and to Oscar Cain, your attorney, greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, in the State of California, within thirty



days from the date of this writ pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Eastern District of Washington, Northern Division, wherein Spokane & Inland Empire Railroad Company is plaintiff in error, and you are the defendant in error, to show cause, if any there be, why the judgment and other proceedings had in said cause in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the HONORABLE EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 18th day of February, 1913, and of the independence of the United States, the 137th.

(Signed) FRANK H. RUDKIN,  
United States District Judge.

(Seal.)

Attest:

W. H. HARE, Clerk.

By FRANK C. NASH, Deputy.

Endorsements: Service of the within Citation is hereby acknowledged this 18th day of February, 1913.

(Signed) OSCAR CAIN,  
U. S. Attorney.

Citation (Lodged Copy.). Filed in the U. S. District Court for the Eastern District of Washington, February 18th, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

*In the District Court of the United States, for the Eastern District of Washington, Northern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SPOKANE & INLAND EMPIRE RAILROAD,  
COMPANY,

Defendant.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the District Court of the United States, for the Eastern District of Washington, Northern Division:

You will please prepare transcript of the complete record in the above entitled case to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit under a writ of error to be perfected to said Court, and include in said transcript the full proceedings, pleadings, papers, records, and files, to-wit:

Complaint.

Answer.

Reply.

Verdict.

Defendant's motion for judgment notwithstanding the verdict.

Opinion of the Court denying defendant's motion for judgment notwithstanding the verdict.

Defendant's petition for a new trial.

Opinion denying defendant's petition for a new trial.

Judgment.

All stipulations and orders extending the time to file a bill of exceptions.

Bill of exceptions.

Assignment of errors.

Petition for writ of error.

Order allowing writ of error.

Writ of error.

Citation.

Also any and all other record entries, pleadings, proceedings, papers and files necessary or proper to make a complete record upon said writ of error in said cause, transcript to be prepared by law and the rules of this Court, and the rules of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

(Signed) GRAVES, KIZER & GRAVES,

Attorneys for Defendant.

Endorsements: Service of the within praecipe for transcript of record is hereby acknowledged this 18th day of February, 1913.

(Signed) OSCAR CAIN,

U. S. Attorney.

Praecipe for Transcript of Record. Filed February 18, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy.



*In the District Court of the United States, Eastern  
District of Washington, Northern Division.*

No. 1261.

UNITED STATES OF AMERICA,

Plaintiff,

*vs.*

SPOPANE & INLAND EMPIRE RAILROAD  
COMPANY, a Corporation,

Defendant.

CLERK'S CERTIFICATE TO TRANSCRIPT OF  
RECORD.

United States of America,

Eastern District of Washington,—ss.

I, W. H. HARE, Clerk, of the District Court of the United States for the Eastern District of Washington, do hereby certify the foregoing printed pages, numbered from one to 82 inclusive, to be a full, true, correct and complete copy of so much of the record, papers, bill of exceptions and other proceedings as called for by the defendant and plaintiff in error in its praecipe therefor as the same appears on page 82 of this printed record, and as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on writ of error from the judgment of the District Court of the United States for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

I further certify that I hereto attach and herewith transmit the original writ of error and the original citation issued in this cause.

I further certify that the cost of preparing, certifying and printing the foregoing transcript is the sum of \$139.25, and that the same has been paid to me by Graves, Kizer & Graves, attorneys for defendant and plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at Spokane, in said district, this 8th day of March, 1913.

(Signed) W. H. HARE,

Clerk.

(Seal.)

IN THE

**United States Circuit Court**

**of Appeals for the Ninth Circuit**

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**SPOKANE & INLAND EMPIRE  
RAILROAD COMPANY,**

Plaintiff in Error,

vs.

**UNITED STATES OF AMERICA,**

Defendant in Error.

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**Error to the District Court of the United States  
for the Eastern District of Washington**

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**BRIEF FOR PLAINTIFF IN ERROR**

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**STATEMENT OF THE CASE.**

(NOTE.—For convenience in referring to the parties in the statement of the case and its discussion, the parties will be designated as in the trial court;



the plaintiff in error as defendant, and the defendant in error as plaintiff.)

This is an action to recover penalties under the Safety Appliance Act, the plaintiff alleging in its complaint fifteen violations of the act in as many separate counts. Judgment was rendered against the defendant for \$1500, the full amount demanded, and it has sued out a writ of error to reverse such judgment.

Each count of the complaint charges that defendant is a common carrier engaged in interstate commerce by railroad. The first twelve counts charge that defendant on certain specified dates hauled cars over its railroad from which the grab irons or hand holds at the ends were missing. The last three counts charged that on specified dates it hauled cars over its railroad which were not equipped with couplers coupling automatically by impact, but with link and pin couplers. The de-

fendant, answering the first twelve counts of the complaint, admitted that it was a common carrier engaged in interstate commerce, and that it hauled the cars described on the dates specified. It denied, however, that the grab irons or hand holds were missing from the ends of such cars. Answering the last three counts, it admitted as above, and admitted also that the cars referred to were equipped with link and pin couplers, and not with couplers coupling automatically by impact. It pleaded affirmatively in defense to all the counts that all the cars described therein were, on the dates referred to, and at all other times, used by it upon its lines of street railway. Plaintiff joined issue upon the affirmative defense by reply.

The cause was tried to a jury. The record shows that defendant owns and operates a street railway system in Spokane, Washington, and several suburban and interurban lines extending therefrom, including one which extends to Coeur d'Alene,

Idaho. All these lines are operated by electricity. Its passenger station in Spokane is situated in the heart of the business district, and its suburban and interurban trains reach it by passing over its street railway tracks, laid in the city streets, for a distance of about a mile and a quarter. Those tracks are used only by street cars and suburban and interurban trains carrying passengers. The suburban and interurban trains sometimes consist of one car, and sometimes of two or three cars coupled together. Outside of the city, they are run on the defendant's private right of way, are operated by regular train rules, make stops at distances varying from one to the mile to three to the mile, and tickets are sold for them and baggage checked over them as on regular trains. Inside the city, they make stops to take on passengers going out of the city, and to discharge those coming into the city, at intersecting streets, but do not carry passengers from point to point within the city. The



lines are, in short, the usual electrically operated suburban type so common at the present day, the Coeur d'Alene line departing from the usual only in that it extends across a state boundary line.

With respect to the cars described in the first twelve counts of the complaint, it appears that these were used regularly on the run between Spokane, Washington, and Coeur d'Alene, Idaho, two or three cars coupled together usually comprising a train. On each trip these trains ran for a distance of about a mile and a quarter over defendant's street railway lines in going out of and coming into Spokane, there being no other way to enter the city. Several short turns have to be made in this distance in passing from one street to another, the curves necessary to make the turns running from  $36^{\circ}$  to almost  $100^{\circ}$ . The curves on steam railroads run from  $4^{\circ}$  to  $10^{\circ}$ . To make these short curves, defendant's cars are made with a buffer or sill at the end, which is rounded at the

corners. Underneath the sill the coupler is swung, so arranged that it will swing freely from one side of the car to the other. But for this arrangement the cars could not be run over the street railway lines, as it could not make the abrupt turns but for the rounded corners and the couplers swinging freely from one side entirely over to the other. On steam railroads, where no such conditions are presented, the ends of the cars are square, and the grab irons or handholds at the ends of the cars consist of an iron rod fastened to and projecting below the end sill, and that is the construction required by the rules adopted by the Interstate Commerce Commission about a year ago. It would be impossible to equip defendant's cars with such a handhold at the ends and continue to enter Spokane on its street railway tracks, for in making the sharp turns on the streets the couplers, in swinging from one side of the car to the other, would strike the projecting handholds,

either breaking them off every time the train turned a corner, or derailing the cars. When the cars were built, therefore, an angle iron was placed on top of the end sills extending across the end of the car, made of half inch material, and on either side of the coupler, on both ends of the car, openings were left in the iron twenty-two and a half inches long, two and one half inches wide, and about three and one half inches back from the edge of the sill. These, defendant contended, were grab irons or handholds within the meaning of the Safety Appliance Act, and afforded all the protection to men who might be required to go between the cars that would be afforded by any type of handhold.

As to the cars referred to in the last three counts of the complaint, which were charged not to have been equipped with automatic couplers, it appears that they were customarily used on the street railway lines in purely street railway traffic. The



government inspector testified that "They were ordinary traction cars, small in construction. I would consider it a street car. It would be impossible to equip such a car with automatic couplers." Defendant's superintendent testified that the cars "are a small interurban type of car used at the present time in the city limits. They are a large street car. The trucks are low, the bodies are low, the draw bar being not over 18 inches from the rail, and it would not be possible to equip them with automatic couplers, because the clearance would not be sufficient." On the day counted on in the complaint, there was a race meeting at Allan, Idaho, and an unusual press of business. The cars in question were temporarily taken out of street railway service, coupled together with their link and pin couplers in the shops at Spokane, and run as a solid train, without uncoupling, from Spokane to Allan, and then back to Spokane. This, defendant contended, was not a violation of

the Safety Appliance Act.

During the progress of the trial, defendant offered expert evidence to prove that the openings in the tops of the end sills of the cars referred to in the first twelve cars of the complaint served all the purposes of handholds, and were better for that purpose than those generally in use. This evidence was rejected. Error assigned thereon will be discussed in detail under the second head of our argument. At the close of all the evidence, defendant moved for a non-suit and the dismissal of the action on the ground that no violation of the Safety Appliance Act had been proven. The motion was denied and exception taken. Defendant then requested the court to instruct the jury that the plaintiff had not made out a case on any of its counts, and that they must return a verdict in defendant's favor. The court refused to so instruct, and instead instructed the jury to find defendant guilty on the last three

counts of the complaint (those referring to automatic couplers), and left to them as a question of fact whether the openings in the end sills of the cars referred to in the first twelve counts served the purpose of handholds. The jury returned a verdict against defendant on the entire fifteen counts, and defendant moved the court for judgment in its favor notwithstanding the verdict. Its motion being denied, it petitioned for a new trial. This was likewise denied, and from the judgment entered upon the verdict defendant has sued out this writ of error.

### SPECIFICATIONS OF ERROR.

Defendant relies upon the following errors as cause for reversal herein:

First: The action of the court in sustaining plaintiff's objection to the question asked the witness Robertson with respect to the openings in the buffers or sills of the cars referred to in the



first twelve counts of the complaint, which are claimed by defendant to be handholds, *viz.*:

“What would you say of them as a safe and proper appliance, one that would tend to preserve men from injury who might have to go between the cars for any purpose?” (Record, page 57.)

Second: The action of the court during the examination of the witness Robertson, in rejecting the following offer of proof:

“Now, if your honor pleases, I offer to prove by the witness on the stand, and I will call other witnesses, and particularly experienced railroad men, of years of experience, to prove by him and by them, by questions and answers addressed to them, that the opening in the beam or buffer of these electric cars is intended to subserve the same purpose, and does subserve the same purpose, as the round iron appliance that is prescribed by the rules of the Interstate Commerce Commission at the present time and is in use on steam railroads, that it is a better appliance than these are for the purpose of protecting men from injury who have to go between the cars. I offer to

prove that and to ask questions of this witness to that effect.” (Record, pages 57-58.)

Third: The action of the court in sustaining plaintiff’s objection to the question asked the witness Mahan with respect to the openings in the sills of the cars, to-wit:

“Does that opening in the top of the sill serve the same purpose and is it as well fitted for the purpose of protecting the lives and limbs of men who have occasion to go between the cars in the exercise of their duties as the form of grab-iron that is used on steam cars, that is brought below the end of the car?” (Record, page 59.)

Fourth: The action of the court in sustaining plaintiff’s objection to the question asked the witness Mahan with respect to the openings in the sills of the cars:

“In your opinion, Mr. Mahan, and observation of these cars, is the opening in the angle bar a better and safer appliance for the safety of persons having occasion to go between the cars in the discharge of their duties than those

that are used upon steam railroads''? (Record, page 60.)

Fifth: The action of the court in rejecting defendant's offer to prove, during the examination of the witness Mahan, as follows:

“I now offer to prove by this witness, and also by other witnesses called, with your Honor's permission, that the opening in this angle iron or sill or buffer is a better and safer appliance, better protection, greater protection to the men who have occasion to go between the cars than any form of grab iron or handhold that is known in railroad circles.” (Record, page 60.)

6. The action of the court in denying defendant's challenge to the sufficiency of the evidence at the close of all the evidence, and in denying defendant's motion for a non-suit, and that the cause be taken from the jury and the action dismissed upon all of the counts. (Record, page 61.)

Seventh: The court's action in denying defendant's motion that in the event, and only in the event,



that the court denied the motion to dismiss as to all the counts, that it dismiss as to the last three counts of the complaint, those that charged a failure to equip cars with automatic couplers. (Record, page 61.)

Eighth: The court's action in refusing defendant's request to instruct the jury as follows:

“The plaintiff herein has not made out a case against defendant on any of the causes of action stated in its complaint, and you will therefore return a verdict in defendant's favor.” (Record, page 62.)

Ninth: The action of the court in denying defendant's motion to enter judgment in its favor dismissing the action and for costs notwithstanding the verdict returned by the jury, for the reason that the verdict is contrary to law and to the undisputed evidence in the case, and that under the law and the facts defendant was entitled to judgment. (Record, pages 27-33.)

Tenth: The action of the court in denying defendant's petition for a new trial for the reasons and on account of the matters set forth in such petition. (Record, pages 34-38.)

Eleventh: The action of the court in entering judgment upon the verdict against defendant. (Record, pages 39-40.)

The foregoing assignments, while on their surface too numerous for respectful consideration, in fact go to but two questions, the first five presenting defendant's claim that the trial court erred in refusing to receive expert evidence relating to the sufficiency of the openings in the end sills of the cars as handholds within the meaning of the Safety Appliance Act, and the remaining assignments presenting the defendant's claim that it is not amenable to the provisions of the Safety Appliance Act, and that judgment should have been entered in its favor as a matter of law. The speci-

fications of error will be discussed in inverse order to that in which they are stated, since the last assignments, if decided in defendant's favor, will obviate the necessity of a consideration of the first assignments, which merely go to the question of its right to a new trial should it be held that it is subject to the provisions of the Safety Appliance Act.

## ARGUMENT.

### I.

*The Provisions of the Safety Appliance Act Are Not Applicable to Cars Used As Are Defendants.*

The claim that the court should have ruled as a matter of law upon all the evidence that defendant was not guilty of any violation of the Safety Appliance Act is based upon the exception to the act found in the amendment of 1903, which excepts from the operation of the act trains and cars "which are used upon street railways." The evi-



dence discloses, without dispute, that the defendant's cars referred to in the complaint are used upon street railways, and are therefore, as we claim, exempt from the operation of the act.

To appreciate the full effect of the exception, it is desirable to consider the act and its amendments historically.

When Congress enacted the original Safety Appliance Act in 1893, it undoubtedly had in mind only steam railroads and the locomotives and cars used in their operation. Such railroads were then the only sort engaged in interstate commerce, and indeed, were practically the only type. Electricity as a propulsive power was in its infancy. Suburban or interurban railway lines, which the development of electric power have made so common, were then unheard of. If any dreamer in Congress then conceived it possible that at some time the use of electricity might render feasible the exten-

sion of local railway lines beyond the boundaries of cities, his dreams never compassed the notion that such lines would become so numerous and do so large a business that it would be necessary for Congress to legislate concerning them as highways of interstate commerce. By 1903, however, conditions had greatly changed. Electricity had substantially supplanted all other forms of propulsive power in the operation of urban railways, and had called into being many suburban lines, a number of which, generally through the situation of cities on the opposite banks of a stream dividing two states, were highways of interstate commerce. The original act excepted from its penalties "trains composed of four wheeled cars" and "locomotives used in hauling such trains." 27 Statutes at Large, 532. The amendment of 1896 amended this exception so that it read as follows:

"Provided that nothing in this act contained shall apply to trains composed of four wheeled cars or to trains composed of eight wheeled

standard logging cars where the height of such car from top of rear to center of coupling does not exceed 25 inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.”

29 Statutes at Large, 85.

The amendment of 1903 extended the operation of the act in many respects; among others, so that its provisions should “apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the territories and the District of Columbia, and to all other locomotives, tenders, cars and similar vehicles used in connection therewith.” 32 Statutes at Large, 943. With such enlargement of the operation of the act went an enlargement of the exceptions to its operation, the amendment excepting therefrom “those trains, cars, and locomotives exempted by the provisions of section 6 of said act of March 2, 1893, as amended by the act of



April 1, 1896, or which are used upon street railways.”

Giving to the language of the last exception the meaning which, with respect to any other matter, would be given to its plain, simple words, it is patent that defendant's cars which are described in the complaint are not affected by the act. Those cars are used for the carriage of passengers between Spokane, Washington, and Coeur d'Alene, Idaho. Spokane is a city of considerable size. In order to operate defendant's line it is essential that its suburban trains have access to its passenger station in the heart of the city. It owns street railway lines laid upon the city streets which reach that passenger station, and it has no other means of gaining access to that station than over those street railway lines. The cars in question, on every run they make, are run over those street railway lines for a distance of a mile and a quarter in entering and in going out of the city. Their

use upon those lines is an essential, integral part of their use upon a highway of interstate commerce for the carriage of interstate business. But for the fact that they were used upon the street railway lines, they would not be used upon the interstate highway. The fact that they are used over a longer distance, and for a greater length of time, upon a private right of way outside the limits of the city, does not alter the fact that they are used upon street railways in every run they make, and that their use upon street railways is as integral a part of their operation as is their use upon an interstate highway. Unless the plain language of the statute is nullified, then it must be held that they are excepted from the operation of the Safety Appliance Act.

It was urged below, and the trial judge held, that the exception applied only to cars which were exclusively used upon street railways, and did not apply to cars which were used for a part of the

time, or for a part of their run, upon street railways.

If it is permissible for the courts to supplement and amend legislation whenever it seems to them desirable to do so, that construction may be upheld; otherwise not. Had Congress desired to except from the operation of the act street railway lines, or street cars, or cars which are used exclusively upon street railway lines, it may be presumed that in one or the other house some member would have been found with sufficient command of the English language to express the idea. Congress was adopting an amendment to a remedial statute which had been in existence for ten years. By broadest expressions and most sweeping language it had extended the act to embrace every sort of road over which Congress had jurisdiction, and to include every vehicle of whatsoever character used thereon. The Congress of 1893 had thought proper to make an exception to



the operation of this remedial statute. The Congress of 1896 had seen fit to further extend the exception to its operation. The Congress of 1903, while greatly enlarging the general scope of the act, preserved the exceptions introduced by the previous Congresses and added yet another exception thereto. Now the Congress of 1903 was more impressed than the Congresses of 1893 and 1896, even, with the necessity for the regulation of railway companies within the jurisdiction of Congress, and particularly with respect to the provisions for the safety of the employees of such railways. The spirit of the time was trending that way, an historical fact which all men know. It was in sympathy with that spirit that Congress by its amendment made the act applicable to every railway over which it had jurisdiction. For reasons satisfactory to it, however, Congress, while so much extending the operation of the act, deemed it proper to extend still further the exception. But it is plain

that the spirit of the times is reflected in the amendment, and that it would have prevented Congress from making any broader exception than sufficient reasons seemed to require. The exception must have received careful consideration from Congress, for it would not with pains and care have so extended the operation of the act and then unthoughtedly introduced an exception which would nullify much of that which it had accomplished by the extension just provided for. It seems, then, too plain for argument that if Congress had desired to except from the operation of the act only such cars as were exclusively used for street railway purposes upon street railway lines, it would have so expressed itself in language concerning which there could be no misunderstanding.

That Congress did not intend to restrict the exception to cars exclusively used upon street railway lines is made clear by the context. The amendment of 1896 excepted certain types of cars and

locomotives used in hauling them, but only upon the condition that "such cars or locomotives are exclusively used for the transportation of logs." The amendment of 1903 referred to this exception and adopted and preserved it and added thereto the additional exception of cars "which are used upon street railways." Common sense forbids, in the light of these two sections, that the omission to use the word "exclusively" in the last exception should be said to be of ignorance rather than of intention. Mere ignorance has a fashion of borrowing from the wisdom of others, and if the Congress of 1903 was ignorant of the necessity, or at least propriety, of using the word "exclusive" when it meant that an excepted use should be exclusive, it seems somewhat more than probable that it would have borrowed the word from the exception of the amendment of 1896, wherein it was provided that in order that the described trains and locomotives should be exempted, they must be "ex-



clusively used'' for a certain purpose.

The reason upon which the trial judge based his decision on this branch of the case is found in one sentence in his opinion denyng the motion for judgment notwithstanding the verdict:

“The object of the safety appliance act is to protect those engaged in hazardous occupations in which thousands of men are annually maimed and killed, and there is nothing in the record to indicate that there is less hazard in the operation of an interurban train than any other.”

The object of the Safety Appliance Act is stated in the above sentence with undeniable accuracy. We think it quite probable, also, that there is nothing in the record relating to the comparative hazards of the operation of an interurban train and of any other train. That, we conceived at the time of the trial, and conceive now, is not a matter with which the courts have to deal. Their province is to ascertain what Congress has declared and to enforce

its declaration. To base a decision denying exemption from the operation of the act to trains which are used in interurban service merely because the evidence does not indicate that they are less hazardous in operation than other trains which come within the operation of the act, is to overlook the context, and, at the least, is extremely illogical. Congress, from the first, made exceptions to the operation of the act. The act of 1893 excepted trains of four-wheeled cars and the locomotives used in drawing them. In 1896 it added to the former exception trains composed of eight-wheeled standard logging cars and locomotives used for drawing them when the same were used exclusively for the transportation of logs. We fancy that no court would undertake to read into the act trains composed of four-wheeled cars with their locomotives and trains composed of eight-wheeled standard logging cars with their locomotives used exclusively for the transportation of logs, merely because the

record did not suggest that their operation was less hazardous than the operation of trains made up of other sorts of cars, or used for other purposes than the transportation of logs. When the amendment of 1903 was adopted, which undoubtedly extended the operation of the act over many railroads not theretofore embraced within its provisions, Congress saw fit to preserve the former exceptions and to add thereto an exception of trains and cars "which are used upon street railways." We do not believe that the courts have any right to disregard the exception of trains and cars which are used upon street railways merely because in a given case they conceive the operation of those trains and cars to be as dangerous as the operation of any other type of trains and cars.

There is a reason, and a very palpable reason, for the exception, and it becomes apparent upon considering the original act and its several amendments. That the act was intended to remedy the



evils existing in the operation of great railroad systems with thousands of miles of track and employing thousands of men is obvious. It is so declared in the historical treatment of the act in *Johnson vs. Southern Pacific Co.*, 196 U. S. 1. Yet the original act, adopted after all the careful consideration, the discussion, and the amendment which the opinion just referred to shows it to have received in Congress, contained an exception that "nothing in this act shall apply to trains composed of four-wheeled cars or to locomotives used in hauling such trains." Manifestly there is as much danger in coupling four-wheeled cars as in coupling eight-wheeled cars, and a man who is obliged to go between four-wheeled cars is as much exposed to danger from their sudden movement as though he were between eight-wheeled cars. It is clear, therefore, that the exception was made not because the handling of the cars of the excepted type was deemed less hazardous than the handling

of other types of cars, but because Congress thought it unnecessary or unwise to place upon small roads, such as would use cars of the excepted type, the burden it was considered necessary to impose upon the larger railroads of the country.

Came the amendment of 1896, and added to the former exception that of "trains composed of eight-wheeled standard logging cars \* \* \* when such cars \* \* \* are exclusively used for the transportation of logs." Again the cause for the exception is clear. All over the country there were then, and are now, logging railroads, many of which are interstate in character. We conceive it will not be presumed that the entire devotion of cars to the transportation of logs renders them harmless to men who may have occasion to go between them, or who are required to couple them together. It is scarcely to be supposed that Congress in making this exception did so because it imagined that by devoting cars exclusively to the transportation of

logs they became entirely harmless in character. The exception was made, says common sense, because cars of the described type which were exclusively used for the transportation of logs were used by railroads in a small way of business, whose operations were not of sufficient magnitude to cause Congress to impose the burdens upon them that it had upon other railroads.

The same thought marks the exception added in 1903. It is ridiculous to pretend that Congress imagined that the consecration of cars to street railway service rendered them impotent to harm men who would be required to couple them, or go between them in the discharge of their duties. Congress, we fancy, did not suppose there was some inherent virtue in street railway lines which would render the operation of trains over them innocuous when such operation would be hazardous if on a railway line laid upon a private way. Coupling cars with link and pin couplers is dan-



gerous, whether the cars, when coupled, are to be run exclusively upon street railways, or in part upon them, and in part upon a roadbed constructed on private property. Handholds are as essential to the safety of those having occasion to go between cars used exclusively upon street railways as they are to the safety of those who have to go between cars which are only in part used upon such railways. If it be said that Congress made this exception because it was supposed that cars were never run otherwise than singly upon street railways, and therefore there was no need to provide for their equipment with automatic couplers and handholds, it may be asked why, then, Congress thought it necessary to make any reference to them whatsoever, even by way of exception. It never has been held and never will be held so long as reason sways the courts, that a car of any sort and wherever used need be equipped with automatic couplers and with handholds at the end of such car

is not designed to be, and never is, used in connection with other cars. It would be, of course, ludicrous to hold that a car which was never to be coupled to another car need be equipped with automatic couplers, and there can be no occasion for men to go between cars when each car is always operated singly, and therefore there is no occasion to put handholds on such cars. Furthermore, the language of the exception is that thereby there are excepted from the operation of the act, "those trains, cars and locomotives \* \* \* which are used upon street railways." Long before the time it was adopted, also, trains composed of two to five, or even more, cars were habitually run upon the street railway lines of the larger cities, as they are to this day. The reason for this last exception, we insist, is the same as that which incited the previous exceptions, and it rests not in any comparison by Congress of the relative hazard of the operation of the excepted trains and cars with those not

excepted, but upon the ground of the minor character of their operations and the little need there was to regulate them by act of Congress. In 1903 the suburban type of railway, operating on street railway lines over city streets and extending in some instances across the border lines of states beyond the boundaries of cities, was quite common, and it was such railways, we submit, that Congress had in mind and intended to exempt from the operation of the act. And it exempted them, not because the handling of their cars is less hazardous than the handling of cars which do not run upon street railway lines, but because their operations are insignificant in character as compared with the great railroads of the country, and there was not the crying need to guard their operations that existed with respect to larger railroads with their hundreds of thousands of employes.

The record herein discloses another consideration which Congress probably had in mind in



making the exception. Trains and cars which can be run over street railway lines must necessarily be of a radically different type from those which are run on steam railroads, or on any other kind of road which operates exclusively on its own right of way. A car which can be run upon a street railway line cannot depart very far from the street car type. It must not be so large as to occupy an undue amount of the street, and it must be so constructed that it can take the sharp curves where the line swings from one street into another. As an illustration, defendant's trains in passing over the street railway lines to reach its passenger station must negotiate several curves which run from a  $36^{\circ}$  to almost  $100^{\circ}$  curvature. The maximum on a railroad operating on its own way is  $10^{\circ}$ , while not to exceed  $4^{\circ}$  is the usual curve. Because of the gradual curves, steam roads use cars with square ends, and the end handholds are attached to and project below the end sills on each side of the coupler. The

Interstate Commerce Commission, acting under the authority conferred upon it by Congress in that behalf, has required that all cars subject to the act shall be equipped with that style of handhold. It will be impossible for defendant to comply with that rule and run its trains over its street railway lines, for at each curve on the city streets the handholds would either be broken off or the cars derailed by the couplers striking against them as they swing from one side of the car to the other. With respect to the cars referred to in the last three counts of the complaint, it appears that they are merely large street cars, and their bodies are so low, because of the primary use for which they were designed, that they cannot be equipped with automatic couplers. Those cars are used all the time for street railway purposes, and made the one interstate run because of an extraordinary press of business. If they must be equipped with automatic couplers, then cars designed for street rail-

way use can never be diverted to an interstate run. Yet if the exception is regarded at all, it is apparent that Congress expected that cars used for street railway purposes would be run over interstate highways, and intended that they be exempted from the requirements of the act.

There is such a dissimilarity in conditions with respect to the use of cars upon street railway lines, and their use solely upon a line constructed on a private right of way, as to adequately explain the legislative intent in excepting from the operation of the act such cars as are used upon street railways. If a reason for the exception lies in such dissimilarity, then assuredly it will not do to make the exception read that it is only operative when the cars are exclusively used upon street railways.

But we think all this inquiry into the motives which may have animated Congress to make the exceptions it did is quite irrelevant. Congress has spoken, in clear, unmistakable language, and the



courts are concerned solely with the matter of the speech, and not at all with its inciting causes. The decision of the trial judge cannot be sustained without re-writing the exception; a thing quite beyond the power of the courts, however much they may be impressed with its desirability.

To demonstrate the statement just made. The cars upon which are based the last three counts of the complaint are, as has been noted, mere street cars, used upon all other occasions than the one set forth in the complaint in purely street railway service. No one would have the hardihood to say these are not cars which are used upon street railways, for such was the purpose for which they were designed and such the use to which they are put, day in and day out, year in and year out. The act has provided that cars "which are used upon street railways" need not be equipped with the prescribed appliances even though they are "used on any railroad engaged in interstate commerce." If the ex-

ception stands as Congress wrote it, the cars in question are exempt from the provisions of the act. To penalize defendant because of the use of the cars in question for the carriage of interstate commerce on the one occasion, the exception must be re-written so that it shall read "which are *exclusively* used upon street railways," or "while in use upon street railways." Such re-writing is not permissible unless the courts may say they know better what Congress intended, and are more capable of expressing the intent, than was Congress.

The same considerations affect the question presented under the first twelve counts of the complaint, there being a difference in degree only. The cars there described are devoted to suburban business, but it is an essential part of their use in that business that they be used upon street railway lines. A part of every run they make is over street railway lines. It is impossible to use them upon such

lines if they are equipped as the Interstate Commerce Commission has required. As the exception appears upon the statute books, those cars are as much exempt from the operation of the act as the cars described in the three last counts.

There is no authority bearing directly upon the question presented, but upon principle it does not seem doubtful. The Safety Appliance Act is a remedial statute, and must receive a liberal construction, but in that rule there is no justification for disregarding the plain language of the exception. Had Congress not introduced the exception, the act would have applied to trains and cars used entirely for street railway purposes if they carried interstate commerce. Such was the construction given to the equally general language of the Interstate Commerce Commission Act, which contains no exception, in *Omaha etc. Co. vs. Interstate Commerce Commission*, 191 Fed., 40, in holding that the Commission had jurisdiction to regulate fares



charged by a street railway company for the carriage of passengers on street railway lines from a city in one state to another city in another state. But Congress made an exception to the Safety Appliance Act, and it will not do to disregard it, or, what is the same thing, read words into the exception that make it utterly ineffective. That is what will be done if the exception is read to exempt only trains and cars "which are exclusively used upon street railways," or "while in use upon street railways." We venture there is no railway in the United States engaged in interstate commerce the trains and cars of which are operated exclusively upon street railways. If there is such an one, it is so insignificant that only special search would discover it, and when discovered, it would be found that its trifling traffic was carried on in cars operated singly, which need no exception to take them out of the act. On the other hand, there are many notable instances of railway lines engaged in in-

terstate business whose trains and cars, while running principally upon street railway lines, yet make a part of their run on the private right of way of the company. Such is the case of the Omaha and Council Bluffs street railway line, according to the facts stated in the decision above referred to. Other well known instances are the lines between Davenport, Iowa, and Rock Island, Illinois; St. Louis, Missouri, and East St. Louis, Illinois, and Kansas City, Missouri, and Kansas City, Kansas. No doubt others exist, but these are sufficient for illustration. The trains and cars of those railways run principally over the street railway lines of the cities which are their termini. They may be used in some small degree for carrying passengers within the limits of each terminus. That, however, is but an incident of their principal use, which is to carry passengers from a city in one state into another city in a second state. To handle this traffic they must run a part of the distance between

the two cities upon private right of way. In crossing the interstate bridge, at least, they do so, and in the Omaha case above cited, it appeared that the trains also ran over some other private way. Surely it may not be denied that the trains and cars of those roads are "used upon street railways." Yet they may not be held to be within the exception unless defendant's trains and cars also held to be within it. The difference in the use of the street railways is only of degree. It is as necessary to defendant's train service that they be run upon street railways as it is to the train service of the roads above referred to. It was such lines that Congress had in mind when it adopted the amendment of 1903, and they come within the spirit as well as the letter of the exception, and they may only be put without it by changing the exception that Congress made. To do so is a virtual repeal of the exception, for if it is read to apply only to trains and cars used exclusively upon street rail-



ways, there is nothing that can be found in the United States to come within it.

The court will understand that we make no claim of exemption from the act merely because defendant's road is operated electrically, or because its trains are of the type called interurban. Electricity as a motive power is fast supplanting steam, and there is no indication in the act as it now stands that Congress intended the motive power used to affect the question of whether the act applied or not. Neither does the fact that a road is called interurban affect the question of the application of the act. There are many interurban roads in the United States at the present time whose operations differ little, if at all, from the operation of the steam railroad lines of the country. Many there are whose trains are composed of the same type of cars that are run upon the transcontinental lines, and are equipped, as are those trains, with dining car and sleeping cars. But those trains do not

enter cities over street railway lines. They come in upon their private right of way in the same manner that the great railroad lines of the country do, in obtaining entrance into the cities along their route. Passenger and freight traffic is handled over them in the same manner that it is handled over steam railroad lines. Such roads are in real competition with the large railroad systems of the country, both in volume of business and in conduct, and the same reasons which impelled Congress to regulate the larger railroad systems impel it to regulate such interurban systems. The defendant, it appears, operates freight trains over its line, but those trains are operated as are the trains upon larger railroads. They are run exclusively upon the company's private right of way, and the cars and locomotives and motors used in such operation are not and could not be used upon its street railway lines. We make no claim that locomotives, motors and cars so used are within either the letter

or the spirit of the act. The trains and cars which are used in its suburban, or if you please to term it so, interurban business, are engaged in a very different service. They do substantially an urban business. Outside the city, they make from one to three stops to a mile. Inside the city, they stop at intersecting streets to take on or to discharge passengers. It is immaterial that they do not carry passengers from point to point within the city, and that after they have left the city they run upon defendant's private right of way. They are, nevertheless, "used upon street railways," and such use is an integral and essential part of the only use to which they are devoted. And though they are run over the boundary line between two states, the traffic is *quasi* urban. The service they give, and the nature of their use, differs not at all in kind and but little in degree from the service and use of the trains and cars which are run between Davenport and Rock Island, St. Louis and East St.



Louis, Kansas City, Missouri, and Kansas City, Kansas. If the trains and cars of those roads are excepted from the operation of the act because it is an integral and essential part of their use that they run over street railway lines, then the same exception takes out defendant's cars from the operation of the act.

## II.

*Expert Evidence Should Have Been Received Concerning the Sufficiency of the Handholds.*

If the point urged under the preceding head be ruled against us, and it be held that defendant's cars are not exempt from the operation of the Safety Appliance Act, there still remains for consideration the question whether defendant is not entitled to a new trial because of the exclusion of evidence offered by it tending to prove that the cars referred to in the first twelve counts of the

capable of forming a correct conclusion as was the railroad man of many years' experience in the switching and otherwise handling trains and cars.

We suppose the average man on the street knows that notwithstanding the use of automatic couplers, railroad switchmen, brakemen, and conductors must still go between the cars in making up or breaking up trains. He has probably seen them go between the cars many times in the course of their work. But that is as far as his knowledge goes. He does not know for what purposes they are required to go between the cars, what they are required to do while there, or the positions they must assume while working there. Not knowing those things, he is incapable of forming a correct opinion whether one form of handholds will conduce to their safety while engaged in their work, while another one will not. Undoubtedly any inexperienced man might *guess* as to whether a certain form of handhold would or would not protect the trainmen engaged

in their work between the cars, but how is it possible to say that his guess would be a correct one?

As was well said by Judge Van Devanter in *United States Smelting Co. v. Parry*, 166 Fed., 407, in holding admissible the testimony of a practical brick-mason and builder as to the safety of a scaffold constructed in a particular manner, expert testimony of witnesses possessed of special training, experience, or observation is admissible "when it will tend to aid the jury in reaching a correct conclusion, the true test being not the total dependence of the jury upon such testimony, but their inability to judge for themselves as well as the witnesses." Later on in the opinion, he said:

"Doubtless the farmers, stockgrowers, merchants, and clerks who composed the jury were more or less capable of judging of the safety of the scaffold in question and of the necessity for securing the planks in one of the modes suggested; but it is quite reasonable to believe that they were not as capable of doing so as a practical brick mason and builder of many



years' experience in the use and construction of scaffolds, and that the opinion of a witness possessed of the special knowledge which is born of such experience was calculated appreciably to aid them in reaching a correct conclusion."

It would be quite as reasonable, we think, to say that the average man on the street, entirely inexperienced in railroad work, knows as well as any thoroughly experienced railroad man what has to be done in making up and breaking up trains, and is as competent as the most experienced man to do the work, both with respect to the end to be attained and to his own safety in doing it, as it is to say that one knows as well as the other what form of appliance would be most efficacious for the protection of men engaged in the work, and whether one type was as good for that purpose as the other. The work of the switchman and brakeman is recognized everywhere as one of the most hazardous, notwithstanding the safety appliances now required, in

which men engage. Everyone recognizes that the greenhorn, or inexperienced man, who would plunge into that work would risk his life or limb, and probably be utterly incapable of performing it. What reason is there for saying, these facts being accepted, that the greenhorn, the inexperienced man, knows as well as the skilled and experienced railroad man what appliances are best fitted to preserve the men from danger while they are engaged in this hazardous work? The proposition seems so evident that its mere statement should convict the trial judge of error in rejecting the testimony which defendant offered.

Much more can be produced to convict the trial judge of error than the mere statement of the proposition. In the opinion by Judge Van Devanter, heretofore referred to, a vast number of authorities holding evidence such as this admissible are cited. Other authorities from the federal courts holding such evidence admissible will be

found in:

*Hutchinson etc. Co. v. Snyder*, 107 Fed., 633.

*Wabash etc. Co. v. Block*, 126 Fed., 721.

*Car Co. v. Harkins*, 55 Fed., 932.

*Central etc. Co. v. Williams*, 173 Fed., 337.

This court had the question before it a number of years ago in *Union Pacific Railway Co. v. Novak*, 61 Fed., 573. There a railroad man was allowed to testify as an expert to the number of brakemen it was necessary to have on a train. The court in recognition of the general rule said:

“It is undoubtedly true that witnesses must ordinarily state facts, and not give their opinions. Expert and opinion evidence ought only to be received in cases of necessity, in regard to matters which require peculiar skill and knowledge, which are not common to men in general, and without which knowledge the jury would be unable, from the facts, to properly decide the matter. If the relation of the facts and their probable result can be determined without special skill and knowledge, the facts themselves must be given in evidence, and



the conclusions or inferences must be drawn by the jury."

It held that the matter of the operation of a railroad train, however, was so far outside the knowledge of the ordinary man that the evidence was admissible, and in so holding it quoted from *Railroad Co. v. Bailey*, 11 Ohio St., 335, the following language:

"That the running and management of railroad locomotives and trains is so far an art outside of the experience and knowledge of ordinary jurors as to render the opinions of persons acquainted with the running and management of such locomotives and trains, as experts, admissible and proper testimony, in proper cases, is very clear on principle, and is so recognized in *Quimby v. Railway Co.*, 23 Vt. 394, and *Railway Co. v. Reedy*, 17 Ill. 580. See, also, *Railroad Co. v. Smith*, 22 Ohio St. 227."

In *Chicago etc. Co. v. Price*, 97 Fed., 423, the Circuit Court of Appeals for the Eighth Circuit held that a locomotive engineer might testify that the

rough and uneven condition of a railroad track would be likely to cause a coupling pin to be thrown out while a train was going down grade over such track. Said the court:

“It is not probable that the farmers, mechanics, and business men who composed the jury in this case were as capable of forming a judgment upon the effect of a rough railroad upon the links and pins with which the cars of a freight train are fastened together as a locomotive engineer who has been operating a railroad train for years. *Motey v. Granite Co.*, 36 U. S. 682, 689, 20 C. C. A. 366, 370, 371, and 74 Fed. 155, 159; *Railway Co. v. Edwards*, 49 U. S. App. 52, 56, 24 C. C. A. 300, 302, and 78 Fed. 745, 747; *Fireman’s Ins. Co. v. J. H. Mohlman Co.*, 62 U. S. App. 287, 291, 33 C. C. A. 347, 349, and 91 Fed 85, 87; *Clifford v. Richardson*, 18 Vt. 620, 627.”

In *Pittsburgh etc. Co. v. Lamphere*, 137 Fed., 20, the Circuit Court of Appeals for the Third Circuit held that an experienced railroad man might testify what, in his opinion, good railroading required with respect to the location of tell tales on

each side of overhead bridges.

In *Chicago etc. Co. v. Hale*, 176 Fed., 71, the Circuit Court of Appeals for the Eighth Circuit held that an experienced brakeman might testify as to how many brakes would be required in order to safely handle cars passing over a certain track, saying:

“The general rule is that witnesses must testify to the facts within their knowledge, and that they may not state their opinions. But there is a well-established exception to this rule to the effect that the opinions of witnesses who possess peculiar skill or knowledge may be received when the facts are such that persons without such skill or knowledge, and presumptively the jurors, are likely to prove incapable of forming a correct judgment relative to the matter in hand without the aid of such opinions. *Chicago Great Western Ry. Co. v. Price*, 97 Fed. 423, 426, 38 C. C. A. 239, 242; *Lake v. Shenango Furnace Company*, 160 Fed. 887, 894, 88 C. C. A. 69, 76; *United States Smelting Co. v. Parry*, 166 Fed. 407, 411, 92 C. C. A. 159, 163.”

Coming to a strictly analogous case, it was held



in *Wabash etc. Co. v. United States*, 168 Fed., 1, that upon the trial of the case under the Safety Appliance Act an expert trainman, having testified as to the condition of a coupler, might also testify as to what was necessary in order to operate that coupler. To quote:

“An expert trainman, after describing the broken condition of a coupler, was asked:

‘In the condition in which that coupler was on that end of the car at that time, what was necessary in order to operate the coupler?’

He answered:

‘It would necessitate a man going between the ends of the cars and taking the part of the chain that was left with the coupler to operate that coupler.’

The question was objected to on the ground that it called for a conclusion and invaded the province of the jury. In our judgment the mode of operation of automatic coupling mechanism and the effect of various conditions thereof were proper subjects for expert testimony.”

We fancy it will be something more than difficult

to draw a distinction between a ruling that when the condition of a coupler has been described, an experienced trainman may state what is necessary in order to operate the coupler, and a ruling that an appliance upon a car being described, an experienced trainman may testify whether that appliance would serve the purpose of a handhold in protecting trainmen from injury while engaged in work between the cars. That was the fact we attempted to show, and we based our claim of right to show it upon what seemed to us the patent fact that an inexperienced man could by no possibility form so good an opinion as a thoroughly experienced man as to the sufficiency of such an appliance.

Turning from the federal decisions, the rule above invoked is found iterated and reiterated in the decisions of the state courts.

In *Ft. Worth etc. Co. v. Wilson* (Tex.), 24 S. W., 686, witnesses experienced in railroad work and particularly in the work of keeping roadbeds and

tracks in condition were permitted to testify that a certain track was not properly constructed.

The same ruling was made in *Colorado etc. Co. v. O'Brien* (Colo.), 27 Pac., 701, upon the ground that "the question was one of science, skill, and experience, and therefore proper for the opinion of an expert, based, if necessary, upon a hypothetical question properly framed."

In *Louisville etc. Co. v. Frawley* (Ind.), 9 N. E., 594, it was said:

"The plaintiff was permitted to prove by witnesses, who were admitted to testify as experts, the relative manner of coupling cars equipped with single and double dead-woods, and also that the coupling of cars equipped with the latter is attended with more danger than is the coupling of those supplied with single dead-woods. This, it is contended, was not a subject requiring special skill or study, and hence not one upon which it was proper to take the opinion of witnesses. In each instance the witnesses were first asked to describe with some minuteness the difference in



the construction and the process of coupling of cars equipped with double or single dead-woods. With this description and preliminary explanation we have no doubt of the propriety of the evidence. Even non-expert witnesses may give their opinions, in a proper case, where such opinions are based upon facts and observations detailed to the jury. *Carthage etc. Co. v. Andrews*, 102 Ind. 138, S. C. 1 N. E. Rep. 364, and cases cited.

Speaking upon this subject, the supreme court of Iowa said, in a case closely analogous to this: 'The construction of cars, the mode of operating them, and the effect of a particular thing on their safety and usefulness, is a habit, study or science. \* \* \* The ordinary jury would not know the effect of these double dead-woods.'

The testimony received was within the rule that where the question under investigation so far partakes of the nature of a science as to require a course of study, or a previous habit of special practice, in order to the attainment of a correct knowledge of the subject, the opinion of witnesses competent to speak should be received."

In *Neubauer v. N. P. R. Co.* (Minn.), 61 N. W., 912, it was held proper to admit expert testimony

to prove that large ice-tongs were defective and in what respect upon the ground that such tongs “are not in such common use that the proper manner of constructing them is a matter of such common knowledge as to preclude the use of expert testimony as to the same.”

In *Louisville etc. Co. v. Hall* (Ala.), 6 So., 277, it was held that an expert railroad man might testify as to his opinion, and his reasons, as to the merits or demerits of whipping straps as cautionary signals on an approach to an overhead bridge.

In *Betts v. Railway Co.* (Iowa), 60 N. W., 623, it was held that a witness might testify as to whether a car furnished for the shipment of stock was reasonably safe for that purpose.

In *Baltimore etc. Co. v. Leonhardt* (Md.), 5 Atl., 346, it was held that a mechanic might testify as to what contrivances would have rendered a car safe while passing over a certain bridge.

In *Louisville etc. Co. v. Davis* (Ala.), 12 So., 786, it was held that an experienced railroad man might testify whether a man with one arm would be as good and competent a brakeman as a man with two arms.

In *Birmingham etc. Co. v. Wilmer* (Ala.), 11 So., 886, it was held that a brakeman might testify that in his opinion a train was started with an unusually hard jerk.

In *Louisville etc. Co. v. Binion* (Ala.), 18 So., 75, it was held proper to inquire of an expert whether, when a brake becomes tight after it is set, it does not throw off with greater force than usual.

In *Whitsett v. Railway Co.* (Iowa), 25 N. W., 104, an expert witness was permitted to testify that if the motion of an engine is suddenly increased after the speed of a train has been checked with the brakes, it will cause a more or less violent jerking of the train, by which coupling links and



pins might be broken.

In *Reifsnyder v. Ry. Co.* (Iowa), 57 N. W., 692, it was held that expert evidence is admissible to show that in making a flying switch, the proper position of the brakeman is at the brakes.

In *Schroeder v. Ry. Co.* (Iowa), 103 N. W., 985, it was held that the question whether switch frogs are dangerous when unblocked is a proper subject for expert testimony.

In *Missouri Pacific Ry. Co. v. Fox* (Neb.), 83 N. W., 744, it was held that a yardmaster of a railroad company who had been a switchman and brakeman and handled cars of all sorts might testify as to the mode of construction of parts of a car, and express an opinion thereon as to what is proper or improper construction.

In *Jones v. Shaw* (Tex.), 41 S. W., 690, it was held that the conclusions of an expert in building and repairing railroad cars is admissible on the

subject if they are offered as expert testimony.

In *Galveston etc. Co. v. Pitts* (Tex.), 42 S. W., 255, where the issue was the defendant railroad company's negligence in failing to maintain a safe track, opinion evidence as to how the track could be made safe was held admissible.

In *International etc. Co. v. Mills* (Tex.), 78 S. W., 11, it was held that in an action by a brakeman to recover damages for personal injuries alleged to have been caused by the defective condition of the air hose, that a question as to what it would indicate as to the condition of the hose if it was jerked out of the brakeman's hand as he went in to uncouple it after cutting off the air at the angle cock, was a proper subject for expert testimony.

In *Huggins v. Railway Co.* (Ala.), 41 So., 856, expert evidence was held admissible as to what cars could be coupled without going between them, and with respect to the particular cars which were the

occasion of the injury upon which the action was based, that it was proper to testify that the cars could have been coupled without the plaintiff going between them.

The foregoing collection of cases is by no means a complete list of the cases that might be gathered upon the subject, even with respect to railroad work. We confined our citations to cases involving railroad work, not because there is anything peculiar to the rule which we invoke as applied to railroad work, but because they illustrate that railroad work is universally recognized by the courts as work which requires peculiar skill and experience, and has to do with matters of which the average men who make up our juries have no knowledge. The rule which we invoke, and which governs them as it does all other cases with respect to expert evidence of the sort which we tendered, is stated in peculiarly excellent fashion in *Taylor v. Town of Monroe*, 43 Conn., 36, where it was said of the



subject:

“The rule as to experts is, that ‘in cases involving questions of science and skill, or relating to some art or trade, experts are permitted to give opinions; the principle embraces all questions except those, the knowledge of which is presumed to be common to all men. So the business which has a particular class devoted to its pursuit, is an art or trade within the rule.’ *Rochester & Syracuse R. R. Co. v. Budlong*, 10 Howard’s Pr. Rep. 289.

\* \* \* \* \*

The true test of the admissibility of such testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue.”

Applying this language to the matter under discussion, railroads are not uncommon things. Nearly all persons have some knowledge of railroads and their operation. But few persons, if

any, engaged in other occupations than railroad work, have any knowledge as to the appliances necessary, and as to the methods of doing the work. No sane man wholly without experience would undertake to go into a switch yard and engage in the making up or breaking up of a train, coupling and uncoupling the cars and air hose, and going between the cars for all purposes that are necessary in such operations. If he would not undertake that work because he knew himself unfit for it, because of his ignorance of the nature and use of the appliances, what excuse is there for saying that he is as competent as any experienced railroad man to determine whether or not the appliances which a railroad company has furnished for the protection of its employes in doing the work are well calculated to protect them from injury, and superior for the purposes for which they are intended to other appliances furnished by other railroad companies and approved by the Interstate Commerce Commis-

sion? The proposition, we submit, is self-evident. Railroad work is skilled work, and the men who for years have been engaged in it do possess "peculiar knowledge or experience not common to the world," and this "renders their opinions founded on such knowledge or experience" unquestionably of "aid to the court or the jury in determining the questions at issue."

That the exclusion of the proffered testimony was prejudicial to defendant cannot be doubted. The record shows that we offered to prove the sufficiency of the handholds on defendant's cars, and their superiority to the types in common use, not only by the two witnesses called, but by other witnesses, men of long experience in railroad work and in the handling of cars. The jury, we cannot doubt, would not have undertaken to measure their opinion, unaided by skill or experience, against the opinion of skilled and experienced railroad men. Even if their observation of the cars inclined them,



as it undoubtedly did from the nature of the verdict returned, to believe that better and safer appliances might have been used, yet it is scarcely to be doubted that they would have deferred to the opinion of those skilled and experienced in the business. In any event, if the evidence was admissible defendant was entitled to its benefit before the jury.

There is no question of discretion involved. There is no question of the competency of the witnesses to testify. The trial judge held, as matter of law, that the question was one of common knowledge concerning which one man knew as much as another, and that therefore expert testimony was not receivable. If he was mistaken in that view of the law, as the authorities we have cited conclusively prove him to have been, then the cause must be remanded for a new trial with instructions to admit all such evidence as may be proffered by either party.

We urge upon the court, therefore :

First, that trains and cars used and operated as are defendant's are excepted from the operation of the Safety Appliance Act by the exception incorporated in the amendment of 1903, and that defendant is therefore entitled to a remand of this cause with directions for its dismissal; and

Second, that if that point be ruled against us, defendant is entitled to a new trial upon the first twelve counts of the complaint because of the rejection of the evidence tending to prove that the cars which are the basis for those counts were equipped with sufficient handholds.

Respectfully submitted,

GRAVES, KIZER & GRAVES,

*Attorneys for Plaintiff in Error.*





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**In the United States Circuit Court of  
Appeals for the Ninth Circuit.**

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SPOKANE & INLAND EMPIRE RAILROAD Company, <i>Plaintiff in error</i> , <div style="text-align: center;">v.</div> UNITED STATES OF AMERICA, <i>Defendant in error.</i>	}	No. —.
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*ERROR TO THE DISTRICT COURT OF THE UNITED STATES  
FOR THE EASTERN DISTRICT OF WASHINGTON.*

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**BRIEF FOR DEFENDANT IN ERROR.**

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**STATEMENT OF THE CASE.**

(Parties will be referred to herein as in plaintiff in error's brief; i. e., the plaintiff in error as defendant and the defendant in error as plaintiff.)

This proceeding, begun in the District Court of the United States for the Eastern District of Washington, Northern Division, in which the United States of America was plaintiff and the Spokane & Inland Empire Railroad Company defendant, was instituted for violation of the act of Congress known as the safety-appliance act, approved March 2, 1893 (27 Stat. L., 531), as amended by an act approved

April 1, 1896 (29 Stat. L., 85), and as amended by an act approved March 2, 1903 (32 Stat. L., 943).

The declaration contained 15 counts, the first 12 alleging that defendant used in interstate commerce certain cars on specified dates when the grab irons or handholds were missing from the ends of the cars, while the remaining 3 counts charged that defendant used in interstate commerce certain other cars not equipped with couplers coupling automatically by impact and which could be uncoupled without the necessity of men going between the ends of the cars, the apparatus used consisting of what is known as the link-and-pin coupler. In its answer as to the latter three counts, defendant denied that the handholds were missing, but did admit the use of the link-and-pin couplers. It further pleaded as to all counts that the cars described were used on street railways and were therefore not amenable to the law. Issue being joined, the cause came on to trial, and the jury returned a verdict for plaintiff as to the first 12 counts and a like verdict, by direction of the court, as to the 3 remaining counts.

The facts of record are set forth in the brief of defendant in extenso, and therefore a brief summary will suffice here for the purposes of this discussion.

Defendant owns and operates by electricity a street railway system in Spokane, Wash., and several suburban and interurban lines, including one to Coeur d'Alene, Idaho. Between Spokane and Coeur d'Alene it runs regularly scheduled trains, controlled

by train dispatchers and telegraphic orders, governed by train rules, making stops at distances varying from one to the mile to three to the mile, on which passengers and property are transported. Within the limits of the city of Spokane these cars run upon the tracks of the street railway company for a distance of about a mile and a quarter to reach, via the most direct route, defendant's passenger depot, located in the central part of the city, making stops to take on passengers going outside the city and to discharge passengers coming into the city, but not to carry passengers from point to point within the city. Outside the city defendant owns its private right of way. The cars described in the first twelve counts of the complaint were run between Spokane and Coeur d'Alene in trains consisting of two or three cars coupled together, using the city tracks and private right of way as above outlined, when, it is charged, they were not equipped with grab irons or handholds as required by law. The ends of these cars are more or less rounded so that the cars can negotiate short turns. On the upper side of this rounded buffer or sill, on either side of the coupler, about 25 or 26 inches from the center of the car, there is an opening  $22\frac{1}{2}$  inches long,  $2\frac{1}{2}$  inches wide, and  $3\frac{1}{2}$  inches back from the front of the buffer. Immediately below this buffer a radial coupler swings from one side of the car to the other, across the entire front of the car, so as to enable it to make short or extreme curves in turning corners in the city streets. On cars used on



steam railroads the buffer beam is practically square, and ordinarily the grab iron or handhold is attached to and projected outward or downward from the face of the buffer so that it is within the sight and reach of men going between the ends of the cars to couple and uncouple air hose and for other purposes. The objection to this sort of a grab iron on the cars in controversy is that it would interfere with the radial coupler in making the swing at curves.

The cars referred to in the last three counts were described as ordinary street cars which had been temporarily taken out of street railway service, coupled together with link-and-pin couplers and run as a solid train from Spokane to Allen, Idaho, and return, the violation charged being that they were not equipped with couplers coupling automatically by impact and which could be uncoupled without the necessity of men going between the ends of the cars.

The case now comes to this court on the following specifications of error:

#### **SPECIFICATIONS OF ERROR.**

First. The action of the court in sustaining plaintiff's objection to the question asked the witness Robertson with respect to the openings in the buffers or sills of the cars referred to in the first twelve counts of the complaint, which are claimed by defendant to be handholds, viz:

What would you say of them as a safe and proper appliance, one that would tend to preserve men from injury who might have to go

between the cars for any purpose? (Rec., p. 57.)

Second. The action of the court during the examination of the witness Robertson in rejecting the following offer of proof:

Now, if your honor pleases, I offer to prove by witness on the stand, and I will call other witnesses, and particularly experienced railroad men, of years of experience, to prove by him and by them, by questions and answers addressed to them, that the opening in the beam or buffer of these electric cars is intended to subserve the same purpose, and does subserve the same purpose, as the round iron appliance that is prescribed by the rules of the Interstate Commerce Commission at the present time and is in use on steam railroads, that it is a better appliance than these are for the purpose of protecting men from injury who have to go between the cars. I offer to prove that and to ask questions of this witness to that effect. (Rec., pp. 57-58.)

Third. The action of the court in sustaining plaintiff's objection to the question asked the witness Mahan with respect to the openings in the sills of the cars, to wit:

Does that opening in the top of the sill serve the same purpose and is it as well fitted for the purpose of protecting the lives and limbs of men who have occasion to go between the cars in the exercise of their duties as the form of grab iron that is used on steam cars, that is

brought below the end of the car? (Rec., p. 59.)

Fourth. The action of the court in sustaining plaintiff's objection to the question asked the witness Mahan with respect to the openings in the sills of the cars:

In your opinion, Mr. Mahan, and observation of these cars, is the opening in the angle bar a better and safer appliance for the safety of persons having occasion to go between the cars in the discharge of their duties than those that are used upon steam railroads? (Rec., p. 60.)

Fifth. The action of the court in rejecting defendant's offer to prove, during the examination of the witness Mahan, as follows:

I now offer to prove by this witness, and also by other witnesses called, with your honor's permission, that the opening in this angle iron or sill or buffer is a better and safer appliance, better protection, greater protection to the men who have occasion to go between the cars than any form of grab iron or handhold that is known in railroad circles. (Rec., p. 60.)

Sixth. The action of the court in denying defendant's challenge to the sufficiency of the evidence at the close of all the evidence, and in denying defendant's motion for a nonsuit, and that the cause be taken from the jury and the action dismissed upon all of the counts. (Rec., p. 61.)

Seventh. The court's action in denying defendant's motion that in the event, and only in the event, that



the court denied the motion to dismiss as to all the counts, that it dismiss as to the last three counts of the complaint, those that charged a failure to equip cars with automatic couplers. (Rec., p. 61.)

Eighth. The court's action in refusing defendant's request to instruct the jury as follows:

The plaintiff herein has not made out a case against defendant on any of the causes of action stated in its complaint, and you will therefore return a verdict in defendant's favor. (Rec., p. 62.)

Ninth. The action of the court in denying defendant's motion to enter judgment in its favor dismissing the action and for costs, notwithstanding the verdict returned by the jury, for the reason that the verdict is contrary to law and to the undisputed evidence in the case, and that under the law and the facts defendant was entitled to judgment. (Rec., pp. 27-33.)

Tenth. The action of the court in denying defendant's petition for a new trial for the reasons and on account of the matters set forth in such petition. (Rec., pp. 34-38.)

Eleventh. The action of the court in entering judgment upon the verdict against defendant. (Rec., pp. 39-40.)

#### ARGUMENT.

The above assignments involve these questions: First. Are the cars in controversy "used upon street railways?" Second. Are the openings in the buffer beam grab irons within the meaning of the safety-

appliance act? Third. Did the trial court err in refusing to admit expert testimony as to the merits of the openings in the buffer beams as a means of protection to men who may be required to go between the ends of the cars in the course of their employment?

# I.

## **Are the cars in controversy "used upon street railways"?**

The discussion of this question applies to assignments Nos. 6, 7, 8, 9, 10, and 11, which call for determination of the question whether these cars are used on street railways within the meaning of the act and are thus exempt from the provisions of the safety-appliance act.

The first section of the amended act of 1903 reads as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions and requirements of the act entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia, and*

shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section six of said act of March second, eighteen hundred and ninety-three, as amended by the act of April first, eighteen hundred and ninety-six, *or which are used upon street railways.*

The object of the act is to lessen the danger and risk to which men engaged in the hazardous occupation of railroading must subject themselves. Its primary purpose was to increase the safety of employees and travelers. (*Johnson v. Southern Pacific Company*, 196 U. S., 1.) We respectfully submit, therefore, that the trial court was correct in saying that the "object of the act is to protect those engaged in hazardous occupations" and in construing it accordingly. "This act is a remedial statute, and it is the duty of the court to so construe its provisions as to accomplish the intent of Congress—to protect the lives and limbs of men engaged in interstate



commerce.” (*U. S. v. Central of Georgia Ry. Co.*, 157 Fed. Rep., 893, 894.)

Defendant contends that the cars involved in this prosecution are exempt from the application of the safety-appliance acts by reason of the exception of trains and cars used upon street railways. This contention is predicated upon the fact that these cars run upon the street railway tracks while entering and departing from the city of Spokane, for a distance of about a mile and a quarter. The lines on which the cars in controversy run are between Spokane, Wash., and Coeur D’Alene, Idaho, and are called the interurban line, and are operated by electricity.

The company owns the city lines known as the Spokane Traction Company within the city limits, and one suburban line running out to Opportunity. Its passenger station is located at the corner of Maine and Lincoln, very close to the center of the business part of the city. From the freight yards of the company, the passenger station is reached by all interurban trains by leaving the freight yards where they intersect Market Street, using Market Street to Maine Avenue, Maine Avenue to Lincoln, and Lincoln into the depot. \* \* \* (Rec., p. 51.)

On the interurban lines tickets are sold for particular stations, the same as a railroad. We handle baggage for our passengers. Our trains are made up according to standard railroad rules with markers to designate the trains

and are run on schedules and by train orders. The employees who are engaged in the street-car service do not have anything to do with the operation of the interurban service. They use the same tracks, however, that come from the freight depot to the passenger terminal in the heart of the city. We do not take passengers on the interurban trains within the city limits exclusively. We receive passengers at points within the city limits for transportation outside and drop passengers on the interurban trains at various points within the city. But within the city limits we do no strictly street car business. \* \* \* (Rec., p. 54.)

The question at issue is the construction to be given to the words "or which are used on street railways" in section 1 of the safety appliance amended act of March 2, 1903 (32 Stat. L., 943, c. 976).

Salient facts as indicated by the testimony which distinguish the railroad here from a railway such as the statute describes as a street railway:

1. This railway passes over the streets *only* to reach its terminal station in the heart of the city.

2. No local passengers are received and delivered in the city of Spokane.

3. The most direct route is taken into and out of the terminal station.

4. The tracks laid in the streets of Spokane on this direct route for the out-of-State trains are not used by these trains for any of the purposes of a street railway.

5. Passengers on trains in which the cars in question are used travel on tickets from station to station in the same manner as on the steam railroads of the country.

6. Trains in which these cars are used handle baggage in the same manner as steam railroads, in contradistinction to street railways.

7. Trains in which these cars are used run outside the city limits on same tracks which are used for regular freight trains.

8. These cars are of the height of standard cars as distinguished from the low cars used on street railways.

9. These trains are operated according to American Railroad Association Code of Rules in effect on steam railroads of the United States.

10. These trains are run on schedule time and their movement is controlled by train orders issued presumably by a train dispatcher.

11. There is a distinct segregation of the interurban business of this railroad from its street railway business. Employees are distinct and method of operation is distinct. These interurban cars perform no street car service.

12. The distance over which the through trains pass over street tracks to reach terminal is so inconsiderable in comparison with the whole distance covered by these trains as to make it a minor incident of the journey taken as a whole.

The defendant is an interurban electric railroad operating trains of cars of standard height and



gauge and running through the country from town to town over its own right of way for substantially all its mileage between fixed stations in different States, and hauling passengers, freight, and express for long distances at high speed. It handles interstate passengers required to have tickets for their particular destination. Its trains are operated by the train-order system over tracks generally used for interstate freight and passenger traffic. Its interurban trains pass over tracks laid in the public streets for about 3 per cent of their run to reach the terminal station of such railroad in the heart of the city of Spokane, and such tracks are also used by street cars of the same company.

The line from Spokane to Coeur d'Alene, on which the cars in question were used, was not in any sense a street railway. It did not become such when, in approaching its terminal station in the heart of Spokane, it took the most direct route over some city streets and used tracks which were also used by a street railway. The distance over city street tracks was comparatively of minor consequence when the distance from Spokane to Coeur d'Alene, of which the court may take judicial notice is taken into consideration.

Contemplating the purpose and object of this statute it is not possible to give the act a construction consistent with this avowed purpose and permit that which is a mere subordinate and minor incident to the operation of this line to effect the whole interstate railroad running for 40 miles over

tracks laid on its own right of way, used for the general purposes of freight and passenger traffic.

A car is not "used upon a street railway" when as one of its minor incidents it uses tracks *over which cars used upon street railways also run*. The trains in question were interurban trains. The cars were interurban cars. They do not become cars used upon a street railway by a trifling and minor use of tracks over which cars also run which are used upon a street railway.

The exception in the statute as to cars used on street railways was intended to apply only to the ordinary urban street railway which was at the time of the passage of the act a local railway not endowed with the power of eminent domain but running in city or town streets.

But there is a wide line of demarcation between such a street railway then known and a great commercial interurban railroad such as the one in question here. There are three general classes of railroads, viz, street railroads, steam railroads, and interurban electric railroads.

Trains operating on railroads of the third class above named are within the scope of the safety-appliance acts when engaged in interstate traffic and do not escape regulation by an exception intended only to cover railroads of the first-named class.

In *United States v. Atchison, T. & S. F. Ry. Co.* (220 U. S., 37) Mr. Justice Holmes, in delivering the unanimous decision of the court, said, with reference

to the words "continuously operated night and day office," in the Federal hours of service act:

A trifling interruption would not be considered, and it is possible that even three hours by night and three hours by day would not exclude the office from all operation of the law, and to that extent defeat what we believe was its intent.

By a parity of reasoning where for about a mile tracks of a street railway are used in a journey of more than forty miles, such a "trifling" use of street tracks would not take the cars used in the entire journey out of the operation of the safety-appliance acts which would otherwise be applicable.

This is especially true in view of the fact that the safety-appliance act is a remedial statute to be construed so as to accomplish the intent of Congress (*Johnson v. Southern Pacific Co.*, 196 U. S., 1; *U. S. v. Central R. R. Co.*, D. C., 157 Fed., 893), and that its provision should not be taken in a narrow sense (*Schlemmer v. R. R. Co.*, 205 U. S., 1, 10), nor its undoubted humanitarian purpose frittered away by a judicial interpretation which will permit any trunk line of railroad to escape from the obligation of compliance *by running for a short distance over tracks in a street which are also used by a street railway.*

The consequences of a determination favorable to the contention here made by the defendant railroad would be serious and disastrous. Any great railroad system could then voluntarily relieve itself from the obligation of the safety-appliance act by merely run-



ning street cars for a short distance over its tracks in any of its terminal cities. Then, through passenger trains on the Northern Pacific from Seattle to St. Paul need not be equipped with safety appliances if that railroad, for a short distance within the limits of Spokane, operated a few street cars over the same tracks as those used for such through trains.

The New York, New Haven & Hartford system could run its express passenger and freight trains from Boston to New York without safety appliances merely by using a portion of its tracks operated for street-car service in any city through which it passes.

The Illinois Central system, operating trains from Chicago to New Orleans, could escape the law by the same method. The safety-appliance laws would be a nullity and the whole purpose of Congress in its enactment defeated.

But it can not be the true construction of the act of 1903 that the running of trains for one block or for one mile over tracks which are used for street cars will take out of the operation of the law interstate railroad trains which would otherwise be within its scope.

In the judicial determination of the line of demarcation between State and Federal power, the latter is not to be denied because there is somewhere in its exercise a remote incidental infringement upon the former. (See *Wheeling Bridge case*, 18 How., 421, 433; *The Katie*, 40 Fed., 480, 493; *U. S. v. Colorado & Northwestern R. R.*, 157 Fed., 321, 330.)

As an intermingling of intrastate traffic with interstate traffic does not defeat the exercise of the con-

gressional power over the latter (*Baltimore & O. R. Co. v. Interstate Com. Com.*, 221 U. S., 612; *Southern Ry. Co. v. U. S.*, 222 U. S., 20), so the trifling intermingling of street car traffic with the traffic of a great interurban interstate railroad does not operate to relieve the latter from the requirements of a statute which but for such intermingling would be applicable.

If this is the true rule for the interpretation of the Constitution, and the Supreme Court has so declared, can there be any mistake made by the application of the rule to the interpretation of a statute enacted under the clause in the Constitution to which this construction has been given?

As to the trains here in question the defendant operates what is commonly known as an interurban railway, and on this railway its business is to transport passengers and property between points in two States, but does not do a street railway business, i. e., carry passengers between points within the city, either principally or incidentally.

“Street railroads transport passengers from street to street, from ward to ward, from city to suburbs, but the commerce to which Congress referred was that carried on by railroads engaged in hauling passengers or freight ‘between States,’ ‘between States and Territories,’ ‘between the United States and foreign countries.’” (Lamar, Justice, in *Omaha & Council Bluffs Street Ry. Co. v. Interstate Commerce Commission*, Supreme Court, June 9, 1913.)

Primarily, a street railway is one constructed on and along the streets for the carriage of persons from one point to another in a city, with cars stopping at short intervals for the receipt and discharge of passengers. (*Hannah v. Metropolitan Street Ry. Co.*, 81 Mo. App., 78.)

“Used on a street railway,” as these words appear in the proviso, do not cover cars hauled in trains on an interstate railway. They refer exclusively to cars limited in their use to street railway use. Trains hauled a short distance over street car tracks are not used on a street railway, for they are not used in street railway traffic; they are not used as street railway cars; they are not built as street railway cars; their use is not street car use.

Their use is in train service, not in street car service. Their use is one which the defendant’s proof shows is segregated from the street car service which uses these same tracks.

1. Employees used in one service not used in the other.

2. Cars are of different size and construction.

3. No baggage carried on street cars, while these trains have regular baggage cars for passengers’ luggage.

4. Trains in the interurban service and single street cars alone in the street-car service conducted as such.

5. Passengers on the interurban service are ticketed to stations.



In other words, the use of the street car tracks by the interurban line is a mere minor incident and in no manner changes or affects those great general conditions which constitute this interstate line from Spokane to Coeur d'Alene, a railroad in contradistinction to a street railway.

It is as long as the old Boston & Providence line and longer than the first New England Railroad between Boston and Lowell.

Except as to motive power, *it bears all the marks of a railroad* as that term is broadly used in decisions and in statutes. The defendant in its brief (p. 44) repudiates any exemption because road is operated electrically.

The difficulty alleged in the railroad brief as to curves is not at all insuperable. Similar service in Portland, Oregon, has by a simple mechanical device overcome this difficulty so that in making curves these buffers do not come in contact and handholds are in their proper place as required by law.

The defendant's contention that the act does not apply to cars that are at all used upon street railways, no matter how trivially or incidentally to their principal employment, is not in consonance with the purpose and intent of Congress.

In the case of *Moore et al. v. American Transportation Co.* (24 How., 1) the Supreme Court of the United States had before it the construction of a statute of March 3, 1851, which provided "That this act shall not apply to the owner or owners of any

canal boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation." In construing the phrase "used in rivers or inland navigation," the court said:

This word "used" means, in the connection found, "employed" and doubtless, in the mind of Congress was intended to refer to vessels solely employed in rivers or inland navigation.

So here, contemplating the purpose and object of this statute, it is reasonable to suppose that Congress intended to exclude from its operation only such cars as are used solely on street railways.

In *Union Mutual Accident Assn. v. Frohard* (134 Ill., 228; 25 N. E., 642; 10 L. R. A., 383) the Supreme Court of Illinois held that where a hardware merchant, insured in an accident association, was accidentally killed while hunting, for recreation, his widow, the beneficiary named in the policy, was not prevented from recovering the full amount of the insurance by reason of a by law of the association and clause in the policy to the effect that when any member is fatally injured while engaged temporarily in any act or occupation more hazardous than the one in which he was accepted, the amount to be paid shall be equal to the rate of the occupation in which he was engaged when receiving the injury, although the amount to be paid in the case of a hunter is less according to the by laws than in the case of a hardware merchant.

In *Erriccson v. Brown* (38 Barb., 390) the Supreme Court of New York passed upon a similar question

in construing a statute enacting a personal liability of stockholders in a steamship company for the labor of "laborers and operatives." Brown, a civil engineer, who had rendered services and manual labor combined, was said by the court to be without the pale of the statute. Justice Peckham, speaking for the court, at page 392, said:

Could it be contended that the plaintiff would be included in such an enactment under the word laborer? I think not. He would no more be included than a lawyer who rendered professional service. \* \* \* Each may involve some manual labor, but that is the incident rather than the principal of service.

We respectfully submit, therefore, that the assignments Nos. 6, 7, 8, 9, 10, and 11 are not well founded in point of law, and that the trial court did not err in refusing to hold that the cars in question were used on street railways within the meaning of the safety-appliance law.

## II.

**Are the openings or depressions on either side of the buffer beam handholds within the meaning of the safety-appliance act?**

If our contention that all these cars are amenable to the safety-appliance law is sustained, it then becomes necessary to ascertain whether they were equipped with handholds and couplers as required by the act. The first twelve counts of the declaration charge that the cars named were not equipped



with grab irons or handholds and the last three counts charge failure to use automatic couplers.

It is contended by defendant that certain openings in the buffer are handholds within the meaning of the act.

The act refers to handholds or grab irons. This means the specific device known as such which was in general use at the time of the passage of the act.

Nothing in the terms of the act specifically authorizes *any substitute therefor*.

The charge of the court was especially favorable to the plaintiff in error in that it laid down that the requirement of the statute was met by some such appliance which will afford equal security with the appliance technically known as a grab iron or handhold.

Now the statute requires that the device known as a grab iron or handhold be applied to the car.

It was an appliance so well known that Congress referred to it by name.

It was a device of such a shape that it could be grabbed or grasped by the hand.

The device which the plaintiff in error contended could be used as a grab iron was never built or made or constructed for *that purpose*, as witnesses for this railroad testified. (Rec., p. 50.)

But plaintiff in error claims it would serve.

There was no contention in behalf of this railroad that the device on these cars *was* in fact a handhold

or grab iron or was built or constructed for that purpose. Defendant's superintendent (Rec., p. 54) never heard anyone describe these openings as a handhold. Nor was its location as convenient for use as the location of grab irons generally used on railroads.

The device on these cars is manifestly far out of reach instead of being readily at hand for use as is the device recognized under the name of grab iron.

Defendant's own superintendent testified (Rec., p. 55):

I don't believe I could get much more than the ends of my fingers up there myself.

WHEN A HANDHOLD IS NEEDED, EVERY INCH COUNTS.

To reach the device on these cars, an employee who was between cars coupling up or uncoupling air hose when a train for any reason happened to start or move, would have to reach up for a full arm's length, turn his wrist around the top of the car buffer, reach in for  $2\frac{1}{2}$  or 3 inches, then turn his fingers into a mere depression in the top of the buffer.

The opening in the buffer or sill was about 25 or 26 inches from the center of the car. (Rec., p. 49.) It is from  $2\frac{1}{2}$  to  $2\frac{3}{4}$  inches wide, and there is one of such openings on each side of the drawbar. If the car starts, he has to reach up 37 or 38 inches from the ground to get to the top of the end sill, and has to place his hand  $3\frac{1}{2}$  inches over the top of the sill if he

reaches the opening, and then turn it an inch or three-quarters before he can get enough to grab on. (Rec., p. 55.)

This is a radical difference from the grab iron as generally located, where it may be grabbed in one movement and is readily at hand in any emergency. The railroad here undertakes to establish that a hole in the top of the buffer so far away that an operator can only get the ends of his fingers in it with great effort may be considered a legal equivalent to the well-known device which may be grasped by the hand.

When working at air hose, the well-known grab iron is within sight of the railroad man. The alleged substitute therefor on this railroad is not in his sight. He has to take his chances of reaching it without the guidance of his sight.

It is out of reach. It can not be grasped or grabbed, or seized by the hand. It provides only a finger hold even when reached, and on baggage cars it is not even present.

A handhold or grab iron proper may be firmly grasped within the hollow of the hand with the fingers firmly gripped around it.

Such a safeguard is for emergency use, and when such an emergency arises the menace is necessarily urgent, involving danger to life of the employee at work between the cars.

As said by the judge of the district court in this case (Rec., p. 37):



The purpose of the handhold is obvious. As declared by the statute, it is for the greater security of men in coupling and uncoupling cars. In order to subserve that purpose it must be located so that it can be seen, and it must be of such form and size that it can be readily seized in an emergency.

The device in use in these cars was not built or intended for a handhold. The resident engineer of the defendant company testified (Rec., p. 50):

The cars were not made according to my designs, and I do not know whether the openings were constructed for any particular purpose.

The general foreman of defendant company testified (Rec., p. 61):

The grab-iron or handhold used on steam railroads is a long piece of metal affixed to the end of the sill projecting downwards *so that it can easily be grasped by the hands. There is nothing like that on these cars.*

The device on these cars was objectionable not only because of its comparative inaccessibility; because of its being out of sight of the employee; because it was not designed or constructed or intended for handholds; because its form was such that it could not be grabbed or grasped; and it was further objectionable in that there was no such uniformity even on the cars on this line as would make it of use in emergency service.

## III.

**Did the court err in rejecting the testimony of experts that the depression or opening in the end sill would afford as much protection to men going between the ends of cars as the grab iron or handhold?**

Defendant offered to prove by means of questions to and answers from persons qualified as experts that the openings in the end sill on these cars would afford as much or more protection to men going between the ends of the cars than the grab irons or handholds. This testimony was excluded on the ground that the jurors were fully as competent to pass upon the question as experts, and that to admit such testimony would be a plain invasion of the province of the jury. The rejected testimony is referred to in the assignments of error, Nos. 1, 2, 3, 4, and 5. Was there error in rejecting this evidence? We submit there was not, for the *statute prescribes the use of a definite, ascertained, and well-known appliance and does not permit the use of any substitute*. This being true, the efficacy of the device in question for the protection of men going between the ends of cars is entirely immaterial and could have been ruled out as bearing no relevancy to the issue.

In its brief defendant reviews a number of cases involving railroad and train operation to show that expert testimony is admissible to assist the jury in forming a conclusion relative to a matter of which it would not be able to judge intelligently except by hearing the opinions thereon of persons possessed of

special knowledge, information, skill, or training. We make no claim that such testimony may not be received in evidence when the facts are such that persons without special skill or training are incapable of forming a correct judgment without the aid of expert-opinion evidence. But in the case at bar even on the theory on which the court submitted the case to the jury, is such testimony necessary to enable the jury to find a proper conclusion? In other words, may not the ordinary juryman ascertain for himself whether these openings would be of the same or equal assistance or help to men between the ends of cars as grab irons, in a moment of critical emergency? It seems to us a mere description of each of the appliances is sufficient to answer the proposition.

The answer sought by defendant by each of the excluded questions was called for substantially upon the very issue which the court submitted to the jury, i. e., was the device in question a substitute for and as safe for use as the ordinary handhold or grab iron?

Upon this issue full evidence was permitted on both sides in description of the form, size, and location of the appliance in question upon all the facts upon which a conclusion could properly be drawn as to the safety of the device in question.

The jury was also permitted to have a view of cars with a regular handhold or grab iron thereon and cars with the device used by defendant on the cars in question.

Jurors had the opportunity to fully examine these appliances and apply to the very device in question



all the evidence bearing thereon. They had the opportunity to measure if they desired the distance of the location of the defendant's device from the position a man would be in who was coupling air hose.

They had the evidence of their own senses on the question whether defendant's device could be grabbed or held by a man's hand.

Therefore there was no error in excluding so-called expert testimony as to comparative safety of the device prescribed by the statute and a device not intended to comply therewith.

That which Congress prescribed was a handhold or grab iron. The device used was not a grab iron or handhold.

The device in question is a mere depression or hollowing out in the top of the buffer beam on either side of the car. It is 25 or 26 inches from the center of the car, about  $22\frac{1}{2}$  inches in length, about  $2\frac{1}{2}$  inches wide, and is  $3\frac{1}{2}$  inches back from the front of the buffer. It can not be seen by a man in a stooping position. On baggage and mail cars it is not even present. (Rec., p. 49.) The resident engineer of the defendant testified that he did "not know whether the openings were constructed for any particular purpose." Defendant's superintendent said: "I never saw on a steam railroad an end sill similar to what we have on the electric railroad. I never heard anyone describe them as a handhold."

The grab iron or handhold designated by the statute and known as such among railroad men is a

bar of iron varying in length projected from the car a sufficient distance to enable it to be easily and readily grasped by the hand.

“All handholds should be made of iron not less than  $\frac{5}{8}$  inch in diameter; handholds on the sides and ends of cars should be 24 inches long in the clear, except end-sill handholds, which should be from 18 to 24 inches long.” (Car Builders’ Dictionary, 1909, p. 130.)

A juror may judge for himself whether a man between the ends of two cars in a stooping position to couple air hose can reach up to the top of the buffer beam, turn his wrist over the top end of the buffer, and put his fingers’ ends in this opening as readily as he could grasp a slender bar of iron always within sight and easy reach, especially in an instant of crucial emergency, when every inch counts.

A man can not grasp a flat piece of iron with only a depression for the grip of his fingers as readily as he can grasp a slender bar of iron. A man can sustain himself better by clinging to a slender iron rod than he can by gripping a flat piece of iron with only a depression in it for the tips of his fingers, more especially when the depression is  $3\frac{1}{2}$  inches from the front of the iron. These propositions are so elementary that they admit of no argument. There is no question here as to the operation of any mechanism.

There is no question here involving technical railroad operation. There is no question as to why it is necessary for men to go between the ends of cars.

The one and only proposition is, a man being between the ends of cars, *would the openings in the tops of the buffer beams afford him the same opportunity for saving himself from injury as the ordinary handhold, should the cars suddenly or unexpectedly start?* In such an instance a man would grab at the first thing in sight within the nearest reach which would prevent him from being dragged beneath the wheels of the cars.

Here is what defendant's own superintendent says of the situation:

The purpose of a handhold is to afford security to a man who is between the cars if for any reason they should start. It is necessary for men to go between the cars and stoop down to connect the air hose and the electric-light and heating wires. The man who is down between the cars is within four or five inches of the ground with his hands. If the car starts, he has to reach up 37 or 38 inches from the ground to get to the top of the end sill and has to place his hand  $3\frac{1}{2}$  inches over the top of the sill if he reaches the opening and then turn it an inch or three-quarters before he can get enough to grab on. I would not say that he could get nothing but the ends of his fingers in if he is stooping down and suddenly has to grab to save his life, but I don't believe I could get much more than the ends of my fingers up there myself. (Rec., p. 55.)

It might very pertinently be added, too, that these openings are 25 or 26 inches from the center of the



car, an additional distance the man would have to provide for if he was engaged in coupling air hose with his hands extended to the center of the car for that purpose.

Now, whether a man could go through the procedure just outlined by the superintendent with more facility than he could reach up and grasp a slender bar of iron within sight and easily accessible we submit is not a matter for expert opinion. And sight should not be lost to the fact that defendant outlined no other method by which a man could save himself, that is, he must always reach for the opening in the same manner, from the front of the beam. But with the ordinary grab iron or handhold, there is no such limitation placed upon him. He can grasp it with equal facility, from front or back, whether the car is moving toward him or away from him. Furthermore, when in a stooping position, with the device in issue, by reason of the fact that it is on the top of the beam, the employee's chance to protect himself is diminished to the extent of the distance the opening in the top of the buffer is above where the ordinary handhold would be. Concretely stated, if the handhold were fastened to the bottom of the beam and projected 3 inches below it, it would be  $15\frac{1}{2}$  inches nearer to the man on the ground than the opening in the top of the beam, for the beam is 9 inches thick, the opening is  $3\frac{1}{2}$  inches back from the front, to which must be added the three additional inches the ordinary handhold projects below the

beam. Not only that, but a man must always reach for the opening over and around the front of the beam, whereas with the ordinary handhold or grab iron it may be grasped from any direction. To illustrate, suppose a man is working with both hands extended under the car and it suddenly lurches toward him, he must withdraw his hands at least to the front of the beam, raise them, or one of them, to the top of the beam, and then extend his fingers over the top more than  $3\frac{1}{2}$  inches before he can secure a clutching hold. With the ordinary handhold, all this procedure is reduced to one simple movement—reaching in a direct line for the grab iron from any direction, whether the hands be under the car and back of the buffer or in front of it.

It is not necessary that the juror be familiar with the breaking up or making up of trains, or coupling air hose, heating wires, etc. The proposition is, being between the ends of the cars for any purpose, would this opening in the end sill afford the employee an opportunity equal to or greater than the grab iron to save himself from injury? Could he make a quick grab for it and be as sure to secure a firm hold as he would in reaching for a handhold? Not being on all the cars, would he be as likely to grab for it, more especially when not in view from a stooping posture? In an instant of emergency an employee has no time to think whether the car is a baggage car or a coach before he grabs. This is the proposition the jury had to decide. Which of these devices

would avail a man whose life is in jeopardy the greater service as a protection? This is a simple issue, not involving the workings of intricate mechanisms or technical railroad operation and can be decided by a juror upon a view without special training fully as well as by men possessed of long years of experience in railroad work or car construction.

It is upon subjects on which the jury are not as well able to judge for themselves as is the witness that an expert as such is permitted to testify. That which is plain ought not to be complicated by the ever-present difficulties which exist when expert evidence is received.

The governing rule deduced from the cases permitting the opinions of witnesses is that the subject must be one of science or skill, or one of which observation and experience have given the opportunity and means of knowledge which exists in reasons rather than descriptive facts, and therefore can not be intelligently communicated to others not familiar with the subject so as to possess them with a full understanding of it. (17 Cyc., 41, et seq., and cases cited.)

Now, what is there of science, skill, training, or experience involved in this controversy as to which of two appliances can be most readily grasped by the hand?

May not any man from a description of the appliances judge for himself which can be more readily grasped firmly and securely, and may he not also



judge for himself which is the more convenient location for the purposes described?

When all relevant facts can be or have been introduced before the jury, and the latter are able to deduce a reasonable inference from them, no reason exists for receiving opinion evidence, and it is inadmissible. (17 Cyc., 41, and cases cited.)

Following this rule, attention may be called to the case of *Baldwin v. St. Louis, K. & N. Ry. Co.* (68 Iowa, 37; 25 N. W., 918), where it was held that the opinion of a witness as to how high a pile of lumber that fell and injured plaintiff should have been piled is not admissible, for piling lumber requires no such technical knowledge or skill as to make it a proper subject for expert testimony.

In an action on the case for running over a child in a street with a horse and wagon (*Brink's Express Co. v. Kinnare*, 168 Ill., 643; 48 N. E., 446) the court sustained an objection to the following question asked by appellant of a witness called in its behalf:

If the driver had seen the boy there do you think he could have stopped in time to avoid the accident?

Court said:

The question was clearly improper as calling for a mere opinion of the witness upon a matter not the subject of expert testimony.  
\* \* \* It was for the jury to find from all the evidence and not for the witness to say what he thought about it.

In the case of *I. C. R. R. Co. v. People*, 143 Ill., 434; 33 N. E., 173, it was held:

One of the witnesses of the company upon the trial below, who was an assistant of appellant's second vice president, was asked the question whether the fast mail train was a regular passenger train, but upon objection made, was not allowed to answer. The refusal of the court to permit him to answer is claimed by the appellant to have been erroneous, but we think the ruling of the trial judge was correct. The witness was asked to decide the very question which the court trying the case without a jury was called upon to decide. A witness is not permitted to give his opinion as an expert in reference to a matter which does not involve a question of science, skill, or trade. To determine whether a train is a regular passenger train is not a subject which "so far partakes of the nature of science as to require a course of previous habit or study in order to the attainment of a knowledge of it." (*Linn v. Sigsbee*, 67 Ill., 75; *Fireproofing Co. v. Poczekai*, 130 Ill., 139; 22 N. E. Rep., 543.) The opinions of witnesses should not be asked in such a way as to cover the very question to be found by the jury or court. (*Chicago & A. R. Co. v. Springfield & N. W. R. Co.*, 67 Ill., 142.) Where the matter inquired about requires no special knowledge and may be determined by a jury upon a sufficient description of the facts in regard to it it is not proper to receive the testimony of experts. (*Hopkins v. Railroad Co.*, 68 Ill.,

32; *City of Chicago v. McGiven.*, id., 347; *Pennsylvania Co. v. Conlan*, 101 Ill., 93.)

The cases on the point are extensive. but we deem it unnecessary further to burden the court with additional citations, since the rule is well established and incontrovertible. Defendant has reviewed a number of decisions in support of its contention, but it will be observed that they all involve some question of skill, science, trade, or "knowledge not common to the world," such as train operation, car construction, workings of mechanisms, etc.

Defendant emphasizes *Wabash, etc., Co. v. United States* (168 Fed., 1) as a "strictly analogous case." From that case defendant quotes as follows:

An expert trainman, after describing the broken condition of a coupler, was asked:

"In the condition in which that coupler was on that end of the car at that time, what was necessary in order to operate the coupler?"

He answered:

"It would necessitate a man going between the ends of the cars and taking the part of the chain that was left with the coupler to operate that coupler."

The question was objected to on the ground that it called for a conclusion and invaded the province of the jury. In our judgment the mode of operation of automatic coupling mechanism and the effect of various conditions thereof were proper subjects for expert testimony.



Thus it will be seen the question was, What was necessary to operate the coupler—a mechanical device? In explaining a mechanical invention or device to a layman not versed in mechanics after the mechanism is described and explained, it is necessary to show how it is operated. Without such explanation the description is incomplete. The court said, “in our judgment the mode of operation of automatic coupling mechanism and the effect of various conditions thereof were proper subjects for expert testimony.” It is not at all difficult to draw a distinction between that case and the one at bar, for in the one there is the question of the operation of mechanism and the effect produced by it under various conditions, whereas in the other the simple question is, Can a man secure a firm grasp of it readily and as quickly as he could with another device? There is no similarity between the cases whatsoever. There is no question of skilled work involved, and the man who for years has been engaged in it does not possess any peculiar knowledge or information not common to the world which would render his opinion founded on such knowledge or experience of any more consequence than that of the juror not skilled or experienced in railroad work.

The defect in the questions which were excluded and in the offer of proof is that no evidence of any of the *elements* constituting safety was offered, no *facts* upon which a conclusion of greater safety in the device in question could be based, but the *naked conclu-*

sion of the witness was asked upon the precise issue which the court submitted to the jury as determinative of the case.

In *Union Pacific Ry. Co. v. Novak* (61 Fed., 573), cited in defendant's brief at page 54, the court says:

*If the relation of the facts and their probable result can be determined without special skill and knowledge, the facts themselves must be given in evidence and the conclusions or inferences must be drawn by the jury.*

While there are cases in which it is proper to ask for the conclusion of competent experts upon the question which is the issue for the jury, such as insanity and the like, yet there ought to be a reasonable discretion in the trial court to determine whether or not on the particular case made by the record there is a necessity for expert aid in the solution of the issue. Conflicting views of experts ought not to be invited where, in the opinion of the trial court, the plain evident facts do not justify it, and where the tender of the expert evidence is limited to the precise issue to the jury, the exercise of the trial court's discretion in excluding such evidence ought not to be disturbed.

In this case there was no prejudicial error, for the statute specifically requires a handhold. These cars had none. Whether something else was just as good as what Congress had prescribed was not open. Railroads can not *substitute* for what the statute absolutely requires. The court might well have ruled as a matter of law that the device described by defend-

ant's witnesses was not a handhold or grab iron and there would have been no error in such ruling.

As to the three counts in which the defendant is charged with using cars with the link-and-pin coupler in interstate passenger trains, the evidence in the record established these allegations, and upon the undisputed evidence the Government was entitled to the ruling made.

We submit therefore that the defendant has not been prejudiced by reason of any of the rulings of the trial court.

Respectfully submitted.

OSCAR CAIN,

*United States Attorney.*

PHILIP J. DOHERTY,

*Special Assistant United States Attorney.*

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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Spokane & Inland Empire Railroad Com-  
pany,                      Plaintiff in Error,

vs.

United States of America,  
                    Defendant in Error.

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Error to the District Court of the United States  
for the Eastern District of Washington

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REPLY BRIEF FOR PLAINTIFF IN ERROR

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I.

*Inapplicability of the Safety Appliance Act to the  
Cars in Controversy.*

We have never at any time questioned that the Safety  
Appliance Act is a remedial statute, intended to render

less hazardous the dangerous occupation of railroading, and that being such it must receive a liberal construction in order that there may be accomplished all that which Congress intended to accomplish. But it must be borne in mind that Congress in enacting this remedial statute has seen fit to make exceptions to it. The intent of Congress in making such exceptions is entitled to the same respect as its intent in enacting the statute, and such intent must be ascertained by the same means in the one case as in the other. That is all we insist upon.

Whether the Safety Appliance Act is applicable to the cars in question does not depend, as plaintiff's counsel seem to suppose, upon the nature of its line of railway; upon whether it falls within one or the other of the "three general classes of railroads, *viz.*; street railroads, steam railroads, and interurban electric railroads" referred to in plaintiff's brief. Congress did not in the Safety Appliance Act legislate concerning classes of railroads and make the act applicable according to class. The original act was made applicable to "any common carrier engaged in interstate commerce by railroad." The amendment made by the Act of 1903 extended it to apply "to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce and in the territories and the District of Columbia, and to all other locomotives,



tenders, cars, and similar vehicles used in connection therewith, excepting," etc. Now, as said by the Supreme Court in *Omaha etc. Co. v. Interstate Commerce Commission* (decided June 9, 1913), whether the word "railroad," when used in a statute, includes street railroads "is to be determined by construing the statute as a whole." The court determined by a very convincing process of reasoning that street railroads were not within the purview of the Commerce Act, saying:

"When these street railroads carry passengers across a state line they are, of course, engaged in interstate commerce, but not the commerce which Congress had in mind when legislating in 1887. Street railroads transport passengers from street to street, from ward to ward, from city to suburbs, but the commerce to which Congress referred was that carried on by railroads engaged in hauling passengers or freight 'between states,' 'between states and territories,' 'between the United States and foreign countries.' The act referred to railroads which were required to post their schedules—not at street corners where passengers board street cars, but in '*every depot, station or office where passengers or freight are received for transportation.*' The railroads referred to in the act were not those having separate, distinct and local street lines, but those of whom it was required that they should make joint rates and reasonable facilities for interchange of traffic with connecting lines, so that freight might be easily and expeditiously moved in interstate commerce."

The same course of reasoning which is employed in the case just referred to would, if applied to the Safety Appliance Act, require that the word "railroad" used

there should include street railroads. "Street railroads not being guilty of the mischief sought to be corrected," said the Supreme Court in the *Omaha* case, "it is evident that the case is within that large line of authorities which hold that under such a statute the word railroad cannot be construed to include street railroad." But street railroads are guilty of the mischief sought to be corrected by the Safety Appliance Act. The same reasons which impelled Congress to provide that trains running between Omaha and Council Bluffs on the Union Pacific Railroad should be equipped with power brakes and the cars making up such trains should be fitted with automatic couplers and sufficient hand-holds, might be supposed to impel Congress to require that trains running between the same points on the street railway line connecting them should have been similarly equipped and fitted.

"When these street railroads carry passengers across a state line, they, are, of course, engaged in interstate commerce."

*Omaha* case, *supra*.

It is clearly, then, within the power of Congress to legislate concerning the traffic of such lines, and the prohibitory language of the sections referred to is broad enough to apply to street railroads as well as to all others. But here come in the exceptions, and to them solely must we look to see what is excepted from the

operation of the act, because save for the exceptions the act is sweepingly declared to apply "to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce and in the territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting," etc.

When it comes to a consideration of the exceptions and their scope, plaintiff's counsel are again in confusion as to what is dealt with. The exception is not of any *class of railroad* from the operation of the act. The exception is of trains and cars of a particular style or used for some particular purpose, wholly regardless of what sort of a railroad they are run over. The exception in the original act was "*Provided*, that nothing in this act contained shall apply to trains composed of four-wheeled cars or to locomotives used in hauling such trains." This was amended in 1896 to read, "*Provided*, that nothing in this act contained shall apply to trains composed of four-wheeled cars, or to trains composed of eight-wheeled standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains, when such cars or locomotives are exclusively used for the transportation of logs."

It is quite obvious, of course, that the locomotives, cars, and trains of the types above enumerated, or used



for the purpose above specified, might be used on any railroad; the Northern Pacific, the Great Northern, the Southern Pacific, or any other transcontinental line, along with the locomotives, trains, and cars used for the carriage of transcontinental freight and passengers, and yet not be subject to the provisions of the act. For some reason satisfactory to itself, and with which the courts have no concern, Congress, while enacting this remedial statute, chose to take out from its operation certain types of cars, or cars which are used for a particular purpose, no matter though they were engaged in interstate commerce, and though running upon a strictly interstate road.

The same considerations which led Congress originally to except certain types of cars, trains and locomotives from the operation of the act, led Congress in 1903, when greatly extending the operation of the act in other respects, so that it should apply not only to vehicles used in interstate commerce, but also to those used "in the territories and the District of Columbia," and to all similar vehicles used in connection with the commerce therein referred to, to still further extend the exception. So it was there provided that the act should apply "to all trains, locomotives, tenders, cars, and similar vehicles used," etc., but excepting therefrom "those trains, cars, and locomotives exempted by the provisions of §6 of said act of March 2, 1893, as amended by the

act of April 1, 1896, or which are used upon street railways." Considering all these exceptions together, it becomes apparent that whatever reason prompted Congress to make them, it was not because the operation of the excepted vehicles was less hazardous to passengers or employes than that of vehicles which were not excepted. Four-wheeled cars and eight-wheeled cars exclusively used for the transportation of logs must be coupled together into trains and to the locomotives hauling them, and automatic couplers and sufficient hand-holds are as desirable for the safety of employes working about such cars and trains as they are for the safety of employes working about any other sort of train. A passenger train on the Union Pacific Railroad running between Omaha and Council Bluffs runs out of its station in one city and runs to its station in the other over its private right of way, probably with no stops between. Trains running over the street railway lines between the same points pass along the surface of the streets and are required to make frequent stops and are constantly exposed to the danger of collision with other vehicles using the streets. Surely the need of power brakes which can quickly stop the trains is greater on the street railroad trains than on the steam railroad trains, yet it can hardly be contended that the Safety Appliance Act is operative over the street railway trains, for certainly they must be conceded to be

trains which are "used upon street railways." It would seem, then, that if there is any frittering away of the "undoubted humanitarian purpose" of the act through the operation of these exceptions, the blame should be laid not upon any dreaded "judicial interpretation," but upon Congress, which has seen fit to make the exceptions.

The consideration of these exceptions should be approached, then, with the single purpose of discovering from the act, considered as a whole, just what it was that Congress intended to except therefrom. The courts should not be concerned with their own views as to the wisdom or unwisdom of the exceptions, nor should they fear any criticism of their interpretation of the act as a frittering away of the act. Congress has seen fit to make these exceptions. The language employed in the exceptions is plain. Whenever Congress is convinced of the unwisdom of the exceptions, no doubt it will amend the act so as to eliminate them and leave the body of the act to cover the whole subject matter. But until it has done so, it merely rests with the courts to ascertain the intent of Congress.

Congress has said that the act shall apply "to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce and in the territories and the District of Columbia, and to all other locomotives, cars, and similar vehicles used



in connection therewith, except those trains, cars and locomotives exempted \* \* \* or which are used upon street railways." Congress did not except from the operation of the act street railway *lines*. Neither did it except cars "which are exclusively used upon street railways," nor cars "while being used upon street railways," nor cars "which are used exclusively in street railway traffic." With respect to its other exceptions it has provided that the excepted cars, trains, etc., must be such as are "exclusively used for the transportation of logs." The language here relied upon is much broader. Those cars are excepted "which are used upon street railways." That language, of course, can not be stretched to cover the absurd hypothetical cases suggested by plaintiff's counsel. Neither, undoubtedly, could it be stretched to cover the case of cars taken temporarily out of street railway service and placed upon an interstate run, no part of which was over street railway lines. But it does cover unquestionably, we think, such a case as is here presented. We must keep in mind the precise language of the act. The act is made applicable to every sort of a vehicle used on a railroad engaged in interstate commerce save such as are used (so far as this action is concerned) "upon street railways." It seems too plain for argument. An integral, essential part of each trip which the cars in question make is over a street railway line. In order that they may be used

upon the interstate highway for the transportation of interstate traffic, they must be used upon a street railway, for in no other way can they gain access to or leave the City of Spokane. How can it be said that this is not a use of street railway lines? And if it is a use of such lines, why are not the cars "used upon street railways" within the very words of the act? While we grant that the exception may not legitimately be held to cover cars and trains which do not use street railway lines, in part at least, for their interstate runs, we deny that the language of the exception can be so restricted as to cover only such vehicles as are exclusively used upon street railway lines, or exclusively used for street railway traffic. It cannot be so restricted for two very good reasons. The first is that Congress, by the use of the word "exclusively" in the former exception relating to cars used for the transportation of logs, showed that it understood the meaning of the word. How very easy it would have been for Congress, if it intended the exception to apply only to street cars or cars and trains exclusively used upon street railway lines, or exclusively used for street railway traffic, or while in use upon street railway lines or for street railway traffic, to have said so in common English language. The second reason why it may not be so restricted is that it is a palpable thwarting of Congressional intent to so construe the exception. There can be no doubt that by this particular exception

Congress intended to cover exactly such cases as the Omaha and Council Bluffs street railway line and other similar lines passing from a city in one state to a nearby city in another state. Cases are numerous in the United States where a river is the dividing line between states and considerable cities have grown up on each side of the river. These are always connected, at the present day, by electrically operated lines, cars and trains upon which cross by a private right of way and bridge from the one side to the other, and reach the business portions of the cities over street railway lines. If there be read into the exception here that only such cars and trains shall be excepted as are exclusively used upon street railway lines, then the cars and trains of those roads will be within the act, for that is not a street railway line which makes use of its private right of way. The very term imports a line which is laid upon the public streets.

Again, it must be presumed that Congress made this exception to the act after consideration and for some cause which appealed to it as founded upon reason. Can any reason be suggested why trains and cars which are exclusively used upon street railway lines should be excepted from the operation of the act, and not those which are used for a part of their interstate run upon such lines?

Much is made of the fact that in the case at bar street



railway lines are used for a comparatively inconsiderable portion of the interstate run. Whether the use be considerable or inconsiderable is a wholly immaterial factor in the matter. Either Congress intended, as we claim, to except from the operation of the act such cars and trains as are used for any part of their interstate run upon street railway lines, or it intended, as plaintiff's counsel contend, that only cars and trains which are exclusively used upon street railway lines should be excepted. In either case, then, it is quite immaterial what relation the distance of the run over street railway lines bears to the run over the company's private right-of-way. The important thing is that in the case at bar the interstate journey would not be made, or interstate traffic could not be moved, but for the running of the cars over street railway lines, the use of the cars upon street railway lines. So far as the reason of the thing and the language of the statute are concerned, it can matter nothing that the length of the run upon one line is less than the length of the run upon the other.

We have no intention of following plaintiff's counsel through their discursive argument concerning the merits of the Safety Appliance Act and the great evils which will result if defendant's cars be held exempt from its provisions. We grant all that is said of the beneficent purpose of the act. We merely say that Congress has seen fit to make certain exceptions from its operation.

One of those exceptions covers the cars in question in this action, unless there shall be written into the act words which, while Congress has seen fit to use them in the other exception, were omitted here. We believe the courts have no such power, but must enforce the exception as it is written until Congress sees fit to change it.

## II.

### *Are the Openings in the Buffer Beams Sufficient Hand-Holds?*

As pointed out in our opening brief, the cars in question have rounded buffer beams at each end. Over these buffer beams and extending back to the body of the car, is an iron plate. On each side of the coupler on each end of the car is an opening in this angle iron  $22\frac{1}{2}$  inches long,  $2\frac{1}{2}$  inches wide, and back from the edge of the sill about  $3\frac{1}{2}$  inches. We contended that these were sufficient hand-holds under the provisions of the act, and offered expert evidence to prove that they were sufficient for that purpose. Now, if we correctly understand plaintiff's counsel, it is claimed such evidence was properly rejected because the statute has fixed the nature of the hand-hold with which cars amenable to the operation of the act must be equipped, and it is not permissible to rely upon any substitute therefor. The contention is, in other words, as we understand it, that what is a hand-hold is a question of law and not one of fact.

That contention is shown by the very language of the section which provides for the fitting of cars with hand-holds to be unsound. Section 4 of the act provides that "it shall be unlawful for any railroad company to use any car in interstate commerce that is not fitted with secure grab-irons or hand-holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars." Now, first we have a specific declaration of Congress that the purpose of this requirement is "greater security" to employes. In the fact of this declaration, it certainly would not be for the courts to say that only one type of appliance would tend to the accomplishment of the Congressional purpose. But there is more than that in the section in question. Congress has said that the grab-irons or hand-holds which are provided must be "secure." Does not this provision make the question of what is or what is not secure one of fact in every case? How, under such language, may the courts decide, as a question of law, what is or is not secure in the way of a grab-iron or hand-hold? Furthermore, what is there to guide the court to the end of determining, as matter of law, what is or what is not a secure grab-iron or hand-hold? Evidence was introduced, it is true, showing that on steam railroads a certain type of grab-iron or hand-hold was commonly employed. There was no evidence, however, that there is one and only one type of secure grab-iron or hand-hold. On the contrary, the



defendant's superintendent testified that prior to the Interstate Commerce Commission being given power to prescribe the type of grab-iron or hand-hold that should be used, there was no uniformity in the grab-irons or hand-holds that were placed upon the cars with respect to use, location or anything of the sort (Record, p. 52).

Robertson, a conductor on the Great Northern Railroad, testified that in a general way there was uniformity in such appliances and the place of their location, but that the coaches had hand-holds on the ends of the cars and no strips, while the baggage cars had strips and no hand-holds on one side of the draw bar, and that where there was a hand-hold on passenger coaches it was about midway from the bottom of the sill to the bottom of the car above the track (Record, p. 56).

Now we admit that since the Interstate Commerce Commission, exercising the power conferred upon it in that behalf by Congress, has fixed the style of hand-hold which shall be used, that there is a prescribed standard which must be lived up to. That standard, however, cannot be relied upon here, for the acts complained of for cause of action occurred before the Interstate Commerce Commission had fixed the standard, or at least had made it applicable to defendant's road. We are left, therefore, to determine whether or no these cars were quipped with secure grab-irons or hand-holds to the definition of such appliances given by the act. It is obvious that if the

language of the act alone be relied upon, what is a proper grab-iron or hand-hold, sufficient to satisfy the requirements of the act, is a question of fact unless there is a commonly understood and accepted definition of the appliance which will not permit of any but one meaning being given to the term. Counsel, while contending in portions of their brief that whether the appliances on the cars in question were or were not sufficient grab-irons or hand-holds was a matter of lay knowledge, upon which one man was as capable of forming an opinion as another, yet have favored us, for the purpose of establishing that nothing but a technical hand-hold would satisfy the requirements of the act, with a definition of that term taken from some work which they entitle the "Car Builders' Dictionary of 1909." We submit that if there is such a thing known to car builders or railroad operatives as a hand-hold, and if it has a technical, definite and fixed meaning, in the place of which nothing else could be supplied, that the time and place to establish that was at the trial by the introduction of evidence relating thereto. The Car Builders' Dictionary is probably a standard text-book for car builders, but judges and jurymen have no technical knowledge of that sort. Judges and jurors will be supposed to know the meaning of the words as Webster's dictionary, or any other standard dictionary, gives them. Referring to Webster's International, we find the word "hand-hold" to be: "1. A

hold or grip with the hands; something for the hand to hold onto, as in climbing. 2. The part of an implement that is especially fashioned to be held in the hand." The word "grab-iron" is nowhere to be found. We take it, then, that the word "hand-hold," as it is used in the act, must have been used in the first sense given above, as a place for "a hold or grip with the hands; something for the hand to hold onto, as in climbing." It would certainly seem, therefore, that it is not the province of the courts to declare, as matter of law, what is a secure grab-iron or hand-hold within the meaning of the statute. Certainly it is not the province of the courts to so declare in the absence of proof that the words "grab-iron" and "hand-hold" have some technical meaning, and that nothing less than the appliance that satisfies that meaning can be accepted as within the act.

It has been held that any appliance which the jury may find, as matter of fact, to serve the purpose of the act and accomplish that which was intended by Congress, is a sufficient compliance with the act.

*United States v. Boston, etc. Co.*, 168 Fed., 148.

We have found no authorities to the contrary.

### III.

*Rejection of Evidence as to the Sufficiency of the Hand-holds on the Cars in Question.*

It seems to us that plaintiff's counsel have gone far in arguing the admissibility of this evidence for us. Page



after page of their brief is taken up with statements as to the purpose of hand-holds or grab-irons, as to whether any substitute therefor could accomplish the same purpose which they would accomplish, and particularly whether the appliances in use on defendant's cars would serve the purpose of the act. All this, if it tends to establish anything, tends to establish that if the words "grab-irons" or "hand-holds" used in the act have not a technical meaning which must be declared as a matter of law, and which can be satisfied only by the use of that which, as matter of law, the statute requires, that then whether any appliance is a sufficient compliance with the act is a question of fact. The statute has said that these appliances shall be "secure." Who shall determine the security of the appliance? Why, plainly, the jury who are required to pass upon the issues of fact in the case. And if the jury are to pass upon that issue of fact, why shall not the jury have the testimony of the very men who have to use these appliances as to whether they are or are not secure to aid them in reaching a correct conclusion? No doubt plaintiff's counsel, among their many accomplishments, are thoroughly versed in the science of railroading. One has but to read the discussion with which they have filled pages of their brief as to the insecurity of the appliances in question to know that they feel themselves competent to pass upon all questions of the sort. It can hardly be supposed that mere ordinary jurymen

are possessed of the versitality which these gentlemen possess, and, taken from the plow, the work-shop and the counter, they can hardly correctly determine whether or not men who are working about cars and trains would feel that the appliances in question were or were not secure. It was for the very purpose of aiding in the determination of the question which the statute has said that the jury must settle, *viz.*, whether these appliances were or were not secure, that we offered the evidence in question. We placed upon the witness stand railroad operatives thoroughly experienced in the handling of trains, knowing exactly what were the dangers against which hand-holds are intended to give protection, and inquired whether in their opinion these hand-holds were or were not secure. We went even further than that, for in the case of the witness Mahan we showed that he had had occasion to couple and uncouple these cars (Record, p. 58), that he had had occasion in his railroad experience to use a grab-iron as a life saving device when he was between the cars coupling an air hose when the train was started, and that it was one of the Inland cars in the yards of that company where he had that experience (Record, p. 61). He testified, also, that the men used these appliances for grab-irons whenever they had occasion to couple or uncouple cars or to go between them (Record, p. 58). And yet this witness, with the experience not only of the expert railroad man, but with the

actual experience of the use of these appliances, was held incompetent to throw any light upon the question of the security of the appliance under discussion, and that his opinion with respect thereto could be no guide to the jury in determining whether or not such appliances were secure, as the statute has required them to be.

Such a ruling can be justified only on the theory that the business of railroading and the handling of railroad cars and trains in the many ways in which men must go about them is a business which one man is as competent to do as another, and concerning which one man knows as much as another. Common experience, and the fact that Congress and the legislature of substantially every state in the Union has seen fit to legislate so much concerning the hazards of that occupation, denounces any such theory as fundamentally unsound. Reference to the decisions cited in our opening brief show with what unanimity the courts, and among others this court, have declared against such a theory, and have held that in dealing with dangerous occupations, and particularly the most dangerous occupation of railroading, questions in connection therewith are matters of expert knowledge concerning which jurors are entitled to the opinions of those having experience and particular information upon the subject. We refer to those cases as establishing the error here with the utmost confidence.

Respectfully submitted,

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